(1) Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

WILLIAM H.JOHNSON, and
LINDA L.JOHNSON,
*Petitioners,*

v.

UNITED STATES OF AMERICA
*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

.1. Whether the Internal Revenue Service can legally mail a 2nd statutory notice of deficiency to petitioners for tax years 1981, 1982 and 1983, during an ongoing collection action for petitioners' 1981, 1982 and 1983, tax years, over 6 years after the 1st statutory notices of deficiency for petitioners' 1981, 1982 and 1983, tax years were deliberately mailed to an invalid address.

.2. Whether the Internal Revenue Service employees conspired to deprive petitioners of their property without due process of law by mailing statutory notices of deficiency dated Sept. 3, 1987, to an address where petitioners would not receive them.

.3. Whether the Internal Revenue Service employees conspired to fraudulently conceal material facts relevant to the examination of petitioners' 1981, 1982 and 1983, federal tax years.

.4. Whether the Internal Revenue Service employees conspired to deprive petitioners of their property by mailing them a 2nd statutory notice of deficiency dated Dec. 2, 1993, for tax years 1981, 1982 and 1983.

.5. Whether the Government's Trial Attorney, Ann Carroll Reid, joined the conspiracy to fraudulently conceal material facts relevant to petitioners' district court discovery requests.

.6. Whether petitioners were deprived of their Constitutional Fifth Amendment right to a meaningful hearing within the Internal Revenue Service and by the district court relevant to their 1981, 1982 and 1983 tax years and civil action. cont'd.

.7. Whether the district court erred in its decision relevant to petitioners' 26 U.S.C. Section 7422 cause of action for refunds of tax overpayments and statutory interest for 1988, 1989 and 1990, and to petitioners' motion for summary judgment pursuant to their 26 U.S.C. Section 7422 cause of action.

.8. Whether the district court erred in its decision relevant to petitioners' 26 U.S.C. Section 7433 cause of action for damages for unauthorized collection actions.

.9. Whether the district court erred in its decision relevant to petitioners' 5 U.S.C. Section 552(a)(4)(B) cause of action for judicial review of Internal Revenue Service withholding of records.

.10. Whether the district court's wide discretion as a factfinder includes the addition of the deliberative process privilege claim in its order dated March 29, 1999, which the Respondent **did not claim** and which could only have applied to the document "District Counsel's Response."

.11. Whether the district court abused its discretion by granting the Respondent's motion for summary judgment before petitioners' discovery was completed.

.12. Whether the district court abused its discretion by not disqualifying itself pursuant to 28 U.S.C. Section 455(a).

.13. Whether the Court of Appeals applied the proper standards in evaluating the district court's decision to grant Respondent's motion for summary judgment on all counts. cont'd.

.14. Whether the Court of Appeals erred when it did not reverse the district court's judgment and order new trial before a different judge.

.15. Whether the Court of Appeals erred in denying petitioners' motion for appointment of a Special Master to hold hearings relevant to the Internal Revenue Service disclosure office misconduct and Respondent's Trial Attorney's misconduct.

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## PARTIES TO THE PROCEEDINGS

Petitioners William H. Johnson and Linda L. Johnson were also the petitioners in the Court of Appeals, and Respondent United States of America was the responden. below.

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## PETITION FOR A WRIT OF CERTIORARI

William H. Johnson and Linda L. Johnson, appearing *pro se* , respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the eleventh Circuit in this case.

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## OPINIONS BELOW

The district court's decision granting Respondent's motion for summary judgment on all counts, App. 4-26, *infra*, is unpublished. The district court's judgment, dismissing Petitioners' action, App. 27, *infra*, is unpublished. The district court's order denying Petitioners' motions for reconsideration, stay of judgment pending appeal and for judicial disqualification, App. 28-31, *infra*, is unpublished. The district court's order denying Petitioners' motion for reconsideration, re: judicial disqualification, App. 32-34, *infra*, is unpublished. The court of appeals' order denying their petition for rehearing, and petition for rehearing *en banc*, App. 35-37, *infra*, is unpublished. The court of appeals' judgment, App. 38-39, *infra*, is unpublished.

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## JURISDICTION

The opinion of the court of appeals was filed on April 24, 2000. App. 1-3, *infra*. A petition for rehearing and rehearing *en banc* was denied on July 7, 2000. App.35, *infra*. This Court has jurisdiction to review the court of appeals' opinion pursuant to 28 U.S.C. section 2101(c).

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## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitution of the United States, Amendment 5, App. 63; 5 U.S.C. sections 301,App.63, 552(a)(4)(B), App. 64; 18 U.S.C. sections 241, App. 64, 2071, App. 65; 26 U.S.C. sections 6212, App.65-66, 6213, App. 66, 6501, App.66, 7422, App. 67, 7433, App. 67-68; 28 Chapter I- Part-50- Statement of Policy, Order No. 530-73, App. 68-69; 28 U.S.C. sections 144, App. 70, 455, 455(a), 1346(a)(1), App. 70-71; 26 C.F.R. sections 301.7433-1, 601.105, App. 71-72, 601.106(f)(1), App. 72, 601.702, 601.702(c)(8), App. 73-74; Internal Revenue Manual (IRM) sections 1(15)59.26, App. 75 3(15)(185)0, 3(15)(185)(12).1, App. 75-76, 3(15)(185)(13).4, App. 76-77, 4243.2, App. 77; Disclosure of Official Information Handbook, section (13)34, App.78; Document 6209, App. 78-79.

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## STATEMENT

Internal Revenue Service Project 21, as it was applied to petitioners William H. Johnson and Linda L. Johnson for their federal tax years 1981, 1982 and 1983, was a willful and malicious conspiracy to deprive petitioners of their Constitutional Fifth Amendment due process rights of timely statutory notice and meaningful hearing , before seizing their property, in violation of 18 U.S.C. section 241 and numerous other statutes and regulations.

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## REASONS FOR GRANTING THE PETITION

William H. Johnson and Linda L. Johnson, petitioners herein, express a belief that the United States Court of Appeals for the Eleventh Circuit has entered a decision in conflict with its own decisions and decisions in other United States courts of appeal on the same important matters and has decided important federal questions in a way that conflicts with relevant decisions of this Court.

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**.1.** On or about Feb. 22, 1988, Respondent assessed an alleged federal tax liability against petitioners for federal tax years 1981, 1982 and 1983. In late 1988, a collection action for petitioners' federal tax years 1981, 1982 and 1983 was started in Georgia with the filing of federal tax liens, all of which remained in continuous force until July 29, 1994, when one of these liens was released. Two of these liens remained unreleased until May 12, 1995. Sometime before March 24, 1993, IRS District Counsel concluded that the notices were of questionable validity and "therefore, it would be best not to rely on the original statutory notices of deficiency." They also agree with me that new deficiency notices can be mailed to the taxpayers. (See copy of District Counsel's response in case file.) Appeals Settlement Memorandum, App. 41-49, at App. 47. "The IRS can issue multiple notices as long as the taxpayer has not petitioned the Tax Court and the statute is still open. *Lewis E. Smoot v. Commissioner,* 25 BTA 1038 (1932)." "The only problem that I see is that the Philadelphia District examination files cannot be located. App. 48

On March 23, 1993, Revenue Officer, Janet Grimes received a telephone call from Appeals Officer Patricia E. Hoyt which states, in part, "Tax amount is

incorrect, in addition to examination issuance of statutory notice to wrong address when had a correct address for Tp, Tp never received notice." App. 50
Petitioners, in Plaintiffs' Answers to Mandatory Interrogatories, filed on July 11, 1996, in district court, (1) reference to RA Butler's knowledge of petitioners' more recent address, (2) reference to Hoyt's partiality in petitioners' appeals conference, (3) reference to C.F.R. section 601.106(f)(1) Rule I relevant to "strict impartiality" between the government and the taxpayer by the Appeals Division, (4) reference to Fifth Amendment Rights, (5) reference to *Smoot,* (6) reference to 2nd notice of deficiency, (7) reference to Attachment 1, 19-26, which was a copy of the Appeals Settlement Memorandum, which was filed in district court on July 11, 1996, with petitioners' complaint. Petitioners, in their opposition to Respondent's motion for summary judgment, (Doc 39), under the "Discussion" raise the issues of the legality of the Feb. 22, 1988, assessments and why a 2nd notice of deficiency was issued. Petitioners also draw the district court's attention to the following subjects, (1) Due Process of Law, (2) Procedural Due Process, (3) Notice, (4) Fair Hearing, (5) 26 U.S.C. section 6212, (6) Last Known Address, (7) Reasonable Care & Diligence, (8) Internal Revenue Manual, (9) Proper Notice. Much of the above information and facts were included in petitioners' "Statement of Material Facts in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment." (Doc 39)

A review of *Smoot,* at 1041, OPINION, Goodrich: "We have previously held that where no petition is filed with this Board appealing from a deficiency notice issued by the Commissioner in accordance with section 274 of the Revenue Act of 1926, a second deficiency notice for the same taxable period may be issued." The qualifier here, is the first notice issued by

the Commissioner, **be in accordance with Section 274 Of the Revenue Act of 1926.** (emphasis added)

Petitioners argue that their first notices of deficiency **were not** issued by the Commissioner in accordance with the provisions of the Internal Revenue Code of 1986 (26 U.S.C.) and that the reliance on *Smoot* , by District Counsel and Appeals relevant to the issuance of the 2nd notice of deficiency to petitioners was improper. Appeals and District Counsel had all necessary facts relevant to the issuance of the 1st notices to an invalid address and had concluded that the notices were of questionable validity and thus the Feb. 22, 1988, assessments were legally unenforceable. Federal tax liens were not released and alleged taxes were not abated.

It is well settled that whatever may be uncertain about the definition of the term "Due Process of Law," all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing. Authorities: *Garfield v. U.S.*, 211 U.S. 249; *Brandt v. Hickel*, 427 F.2d 53; *Mathews v. Eldridge*, 424 U.S. 319; *Bolling v. Sharpe*, 347 U.S. 497; *Dent v. West Virginia*, 129 U.S. 114; App. 80-82, Constitution of the United States of America, Amendment 5. App. 63.

**.2.** Evidence shows that RA Butler began working on petitioners' audit for 1981, 1982 and 1983 on or about May 1, 1986, and that he finished the audit on or about May 19, 1986. Evidence also shows that Butler knew petitioners no longer lived at their old address on May 7, 1986, and that he knew petitioners' new address on May 7, 1986. Appeals Officer investigated the validity of petitioners' Sept. 3, 1987, notices of deficiency and informed RO Grimes, "she is returning case to Examination Division to be reworked

tax amount is incorrect, in addition to examination issuance of Statutory Notice to wrong address when had a correct address for Tp." Hoyt states in Appeals Settlement Memorandum, **App. 46,** "Even when the notices were returned undelivered, the second notices were mailed to the same address. I confirmed with the Philadelphia 90-day letter unit that no notices were issued to other addresses. There is no evidence that any research was conducted to determine a more recent address before the notices were issued." The IRS employees involved with the issuance of the Sept. 3, 1987, notices of deficiency were, Carl J. Butler, Laura Tarboro, J. Jackson and R. Jackson. Butler could not issue the notices alone. The Commissioner violated numerous statutes and regulations; IRM 3(15)(185)0; IRM 4243.2; 26 U.S.C. sections 6212, 6213; petitioners' Fifth Amendment rights to due process and equal protection and 18 section 241, Conspiracy against rights, etc. **App. 63-79** Most of this information was presented to the district court in petitioners' complaint, (Doc 1), Answers (Doc 2), (Doc 5), (Doc 39) and petitioners' Attachments no.1. and no. 12. Petitioners argue that they would have no cause for this civil action for damages against Respondent without the above conspiracy, that failure to mail statutory notices of deficiency to petitioners' last known address rendered the Feb. 22, 1988, assessments legally unenforceable and **was the foundation of an unauthorized collection action pursuant to 26 U.S.C. section 7433.** Authorities: *U.S. v. Price,* 383 U.S. 787; *U.S. v. McDermott,* 918 F.2d 319; *U.S. v. Guest,* 383 U.S. 745; *Walker v. U.S.,* 93 F.2d 383. **App. 82-83**

**.3.** On Jan. 12, 1991, petitioners mailed a joint FOIA request to Atlanta IRS disclosure for records relevant to 1981-1986, and mentioned RA Carl Butler and D. White, in Lancaster, PA. This request was

assigned to assigned to disclosure specialist M. McGovern who contacted Wm. Connelly in Phila. But did not transfer petitioners' request. McGovern was also in contact with Appeals Officer Hoyt who advised Mcgovern, "the files in PA are really the ones he wants & he probably should receive reconsideration." Petitioners were informed by letter dated Jan. 28, 1991, that, "only the tax years 1984 & 1986 are under our jurisdiction." See **App. 73,** (c)(2)(i) and **App. 78,** Making Transfers Petitioners argue that IRS disclosure office employees joined the conspiracy to deprive petitioners of their property without due process by the **fraudulent concealment of material facts** relevant to the examination of petitioners' 1981, 1982 and 1983 federal tax years prior to the entry of the U.S. Tax Court decision entered July 12, 1994. See authorities at no. 2. above.

**.4.** Appeals and District Counsel concluded that the Sept. 3, 1987, notices of deficiency were of questionable validity. App. 47 Hoyt states, "the only problem that I see is that the Phila. District examination files cannot be located." App. 48 Hoyt recommended that this case be returned to the Atlanta District Examination Division for reissuance of the notices if the exam workpapers can be found and suggests, that if they cannot be found, for reconsideration of petitioners' Offer in Compromise. "In any event the taxpayer's correct tax figures would not be less than the amounts of tax shown on the "returns" filed by the taxpayers on Dec.4, 1990." App. 49 The Phila. Exam workpapers were not located and petitioners declined reconsideration of their returns filed on Nov. 27, 1990. Petitioners' Offer in Compromise was not accepted, "manager advised the reviewer (Monica) to issue a 2nd Notice of Deficiency (with figures different from the original notice)." "this approach is consistent with Counsel advice." **App. 56**

This evidence was included in petitioners' Attachment no. 1., filed in district court with their complaint on July 11, 1996. Petitioners argue that Hoyt, Sheffield, Jones, Runyan, Dawson, Gilliam and Word joined the conspiracy to deprive petitioners of their property by illegally issuing a 2nd notice of deficiency dated Dec. 2, 1993, for petitioners 1981, 1982 and 1983, federal tax years. Authorities at no. 2. Above.

**.5.** Petitioners' 1st district court discovery request dated Jan. 20, 1998, was for all documents and material relevant to IRS Project 21. Respondent's Trial Attorney, Ann Carroll Reid, claimed that no such documents exist. That there are no relevant documents to be produced. **App. 62** Petitioners provided the district court with evidence that information relevant to Project 021 did in fact exist. **App.60-61** On or about Nov. 29, 1999, petitioners received from Washington, D.C. IRS disclosure, a copy of Document 6209 for 1987, approximately 390 pages which contained information relevant to decoding the computer transcripts and lead petitioners to IRM 3(15)(185)0, Substitute for Returns (SFR) Program. On June, 9, 2000, petitioners received a response to their FOIA request which included; IRM 4243.2, Undelivered Mail, **App. 77;** section (13)34, Making Transfers, **App. 78;** and section 3(15)(185)0 which included section 3(15)(185)(12).1, Notice Issuance Criteria, from which **a very important line is redacted, App. 75-76** and section 3(15)(185)(13).4, Undelivered Statutory Notices, **App. 76-77.** Petitioners first raised the issue of Reid's misconduct in their motion (Doc 25) for the extension of time for discovery, together with their Attachment no. 9. And requested a discovery hearing. Petitioners outlined additional examples of misconduct by Reid in their opposition (Doc 35) to Respondent's motion for sanctions, together with their Attachment no. 11. Petitioners

argue that Reid and IRS Attorney Clinton Freid joined the conspiracy to deprive petitioners of their property without due process by the **fraudulent concealment of material facts** relevant to petitioners discovery requests. See authorities at no.2. above.

**.6.** On Dec. 4, 1990, Revenue Officer Bridges issued 3 requests fir adjustments for tax years 1981, 1982 and 1983, on the grounds, "Tp never rec'd statutory notification." Response, "Claim rejected. 916C-N- pay tax first. Per auditor L. Messick." "Disallow 81, 82 & 83 Claims- prior audit, tax not paid on claim t/p has changed figures from prior examination with no explanation or backup info advise t/p to pay tax the file Claim to Reopen audit." Petitioners received no meaningful hearing from RA Word on Jan. 28, 1992, nor from Hoyt on July 9, 1992. Petitioners requested a second conference with Hoyt, without response. Petitioners requested a discovery conference in (Doc 25) relevant to Reid's misconduct, which was ignored by the district court and petitioners received no evidentiary hearing by the district court prior to its granting of Respondent's summary judgment motion on all counts. Petitioners argue that they were deprived of their Fifth Amendment right to a meaningful hearing within the IRS and by the district court relevant to their 1981, 1982 and 1983 tax years and civil action. Authorities: *Ochoa v. Hernandez Y Morales*, 230 U.S. 139; *Garfield v. U.S.*, 211 U.S. 249; Mathews v.*Eldridge*, 424 U.S. 319, **App. 80-81;** *Armstrong v. Manzo*, 380 U.S. 545, **App. 86.**

**.7.** The statutory notice of deficiency dated Dec. 2, 1993, was for tax years 1981, 1982 and 1983, **only** The U.S. Tax Court decision dated July 12, 1994, was decided by stipulated agreement of the parties and was based only on the fact that the statutory notice of deficiency was issued **OUT OF TIME** pursuant to 26

26 U.S.C. section 6501. **App.66** **No issues were litigated before the Tax Court by the parties.** Petitioners complaint (Doc 1) causes no.5. to no. 18. Is for tax overpayments and statutory interest for tax years **1988, 1989 and 1990, only.** The Appeals Division would not support a second statutory notice of deficiency without the Phila. Examination workpapers. These workpapers were never located, however, a 2nd notice of deficiency was issued to petitioners regardless. Petitioners argue that the district court erred in granting Respondent's summary judgment motion as to petitioners' 26 U.S.C. section 7422, claims for refunds of tax overpayments and statutory interest for their tax years 1988, 1989 and 1990, on the basis of *res judicata*. Petitioners also argue that they were deprived of their right to a trial by jury on this issue. Authorities: *Commissioner v. Sunnen*, 333 U.S. 591; *U.S. v. Internalnational Building Co.*, 345 U.S. 502; *Cromwell v. County of Sac*, 94 U.S. 351. **App. 93-96**

**.8.** Petitioners' complaint filed July 11, 1996, (Doc 1) & (Doc 2), included 1st cause, damage action for unauthorized collection action pursuant to U.S.C. section 7433. The district court, in its order dated Mar. 29, 1999, **App. 23,** states, "Given the extensive litigation and discovery that had been conducted between Plaintiffs and the IRS prior to June 12, 1994, (July 12, 1994), the court finds that Plaintiffs had a reasonable opportunity to discover the elements of their section 7433 action." As stated at no. 7. Above, no issues were litigated in U.S. Tax Court. The "Record of Audit Activity and AIMS Update" was removed from William Johnson's 1981, 1982 and 1983 examination file before disclosure on May 6, 1992, and Linda Johnson's 1981, 1982 and 1983 examination file was not located. **App. 57-58.** No records were made available for petitioners inspection during Tax Court

discovery. Petitioners were not aware that 3 additional notices of federal tax lien were filed until April 18, 1995. Petitioners did not obtain the following documents until after July 13, 1994: (1) the Tax Court decision, (2) the Appeals Transmittal and Case Memo, **App. 40,** (3) the Appeals Settlement Memorandum, **App. 41-49,** (4) RO Janet Grimes, Investigation History dated 3-23-93, **App. 50,** (5) Reviewers Report, **App. 50-52,** Response to Reviewer's Report, **App. 53,** (6) Addendum to 4318, **App.54,** (7) Handwritten note: dated 11/3/93, **App. 54-55,** (8) IRS Memorandum dated Nov. 17, 1993, **App. 55-56,** and (9) District Counsel's Response was withheld from petitioners by the district court. Petitioners argue that the district court erred in granting Respondent's motion for summary judgment as to petitioners' 26 U.S.C. section 7433 claim for damages for unauthorized collection action. Petitioners argue that their right to action could not have accrued before July 14, 1994, the date they received the Tax Court decision which was an essential element of a cause of action. Petitioners argue that their right to action accrued as late as May 15, 1995, the date the IRS released all liens based on the continuing violation theory. Petitioners argue that the statute of limitations was tolled by the **fraudulent concealment of material facts** by Respondent prior to July 12, 1994. Authorities: Dziura v. *U.S.*, 168 F.3d 581; *Hurt v. U.S.*, 914 F.Supp. 1346; *Gross v. U.S.*, 676 F.2d 295; *Wehrman v. U.S.*, 830 F.2d 1480; *Page v. U.S.*, 729 F.2d 818. **App. 96-100**

**.9.** Petitioners' complaint filed July 11, 1996, included a cause of action for judicial review of IRS withholding of records pursuant to 5 U.S.C. section 552(a)(4)(B), relevant to William Johnson's "Record of Audit Activity and AIMS Update," which was withheld from the May 6, 1992, disclosure. In (Doc 10) filed Dec. 30, 1997, petitioners alert the district court to the

fact that it is very likely that the Dept. of Justice is in violation of Title 28, Chapter 1 Part 50 [Order No. 530-73], **App. 68-69** Respondent moved for summary judgment arguing that it fully complied with the FOIA. Petitioners had included copies of their correspondence with IRS disclosure both prior to and after July 12, 1994, the date the Tax Court decision was entered, in their separate attachment, correspondence, filed in district court on Sept. 24, 1996. Petitioners outlined their efforts to obtain their 1981, 1982 and 1983, records in their opposition to Respondent's motion for summary judgment, (Doc 39). The district court stated in its order dated Mar. 29, 1999, (Doc 43), **App. 24,** "However, the court has granted Defendant's motion for summary judgment on both of Plaintiffs' remaining claims under both 26 U.S.C. sections 7422 and 7433. Accordingly, Plaintiffs no longer have a need for additional discovery from Defendant. Defendant's motion for summary judgment accordingly is GRANTED." Respondent states in its Appeals Brief, pg. 41, "It was not located, and in all likelihood it was one of the documents that earlier had been destroyed by the IRS." See **App. 58,** Handwritten notes; **App. 74,** 26 C.F.R. section 601.702(c)(12), Preservation of records; **App. 63,** 5 U.S.C. section 301, Departmental regulations; **App. 65,** 18 U.S.C. section 2071(b), destroys documents. Petitioners argue that considering the fact that the district court, in granting Respondent's motion for summary as to petitioners' 26 U.S.C. section 7433 cause of action based on what the court assumes petitioners knew prior to the July 12, 1994, Tax Court decision, the withholding and destruction of William Johnson's "Record of Audit Activity and AIMS Update" is highly relevant to Respondent's **fraudulent concealment of material facts.**

**.10.** Petitioners' discovery requests included the

the inspection of the document, "District Counsel's Response." Respondent claimed that this document was protected by Attorney Client Privilege, **ONLY.** Petitioners first addressed the issue of Attorney Client Privilege in (Doc 28), pg. 8, filed in district court on May 22, 1998. Petitioners briefed the Attorney Client Privilege claim in their opposition (Doc 39) to Respondent's motion for summary judgment, filed June 19, 1998. The district court **added** the deliberative process privilege claim in its order dated Mar. 29, 1999, (Doc 43), **App. 9,** which could only have applied to the document, "District Counsel's Response." The district court in its order, (Doc 51), filed July 14, 1999, page 2, states, "The court finds Plaintiffs motion for reconsideration to be without merit. Plaintiffs have in large part presented the court with arguments already heard and dismissed. Further, although Plaintiffs have pointed to certain alleged clerical errors and minor mistakes made by the court in its Order, such errors are not sufficient to warrant reconsideration of this court's grant of summary judgment in favor of Defendants." Petitioners argue that the **addition** of the deliberative process privilege claim in its order is neither a minor mistake nor a clerical error, but, shows the partiality of the district court in favor of Respondent.

**11.** On April 30, 1998, Petitioners filed their motion for summary judgment as to their 26 U.S.C. section 7422 claims for refund, (Doc 22) which included a copy of the Appeals Settlement Memorandum and the Tax Court decision entered July 12, 1994, attached as proof that petitioners as a matter of fact had no federal tax liability for tax years 1981, 1982 and 1983. On May 21, 1998, Respondent filed its opposition (Doc 29) to petitioners' motion for summary judgment, which included a statement of material facts not in dispute. On June 1, 1998,

Respondent filed its motion for summary judgment (Doc 34) relevant to petitioners' causes of action as to 26 U.S.C. sections 7422, 7433 and 5 U.S.C. section 552(a)(4)(B) which included another statement of material facts not in dispute. On June 5, 1998, petitioners filed their opposition (Doc 36) to Respondent's statement of material facts not in dispute (Doc 29). Petitioners disputed the alleged facts at no. 2., no. 4., no. 5. And no. 6. That as a matter of fact, petitioners had no legal income tax liability, civil penalties or additions to tax for either 1981, 1982 or 1983 an that no notice of deficiency was sent to petitioners on Sept. 3, 1987. On June 19, 1998, petitioners filed their opposition (Doc 39) to Respondent's motion for summary judgment (Doc 34) in which they disputed Respondent's alleged facts at no. 3., no 5., no. 6., no.7. and no. 12. Respondent did not send notices of deficiency to either William Johnson or Linda Johnson on Sept. 3, 1987; Petitioners had no income tax liability for 1981; petitioners had no civil penalty for 1982 and Respondent's list of petitioners' FOIA requests contained errors and was not complete. On June 19, 1998, there were four issues presented by motion for summary judgment by Respondent as to material facts which petitioners disputed, (1) whether Respondent sent notices of deficiency to either William Johnson or Linda Johnson on Sept. 3, 1987, (2) whether petitioners had an income tax liability for 1981, (3) whether petitioners had a civil penalty for 1982, (4) whether the IRS fully complied with the FOIA. When Respondent filed its motion for summary judgment (Doc 34), petitioners motion to compel (Doc 19) was outstanding and included petitioners' request for documents & material relevant to IRS Project 21, see **no. 5.** above. Petitioners presented to the district court in their (Doc 35) and Attachment no. 11.,

evidence that information relevant to IRS Project 21 did in fact exist. **App. 60-61** The district court in its order filed Mar. 29, 1999, states, "In addition, Defendant represents that many of the documents requested have already been provided to Plaintiffs and those which were refused do not exist or are not relevant to the claims asserted in the instant case." The information relevant to IRS Project 21 is highly relevant to whether Respondent sent notices of deficiency to either William Johnson or Linda Johnson on Sept. 3, 1987. Petitioners' motion to compel (Doc 20) was also outstanding and included petitioners' request for inspection of the document, "District Counsel's Response." See **no. 5** above. This document was included by reference in the Appeals Settlement Memorandum. **App. 47** Reference is made to "this approach is consistent with Counsel advice." **App. 56** Reference is made to District Counsel in "Reviewers Report." **App. 50-51** Reference is made to District Counsel in Addendum to 4318. **App. 54** The District Counsel's Response" is relevant to the issues in dispute of whether Respondent sent notices of deficiency to petitioners on Sept. 3, 1987, and whether petitioners had an federal income tax liability for 1981 or a civil penalty for 1982. The document "District Counsel's Response' contains directions to staff. **App. 56** Petitioners' Jan 21, 1998, request for inspection of documents (2 SR) at no. 1. Revenue Agent's workpapers relevant to the preparation of Sept. 3, 1987, notice of deficiency mailed to William H. Johnson at 118 East Locust St., Ephrata, PA 17522. Respondent's response: The United States will produce the requested documents to the extent they are still in existence at a time and place to be determined by mutual agreement between the parties. (8 SR) In petitioners' motion for extension of time for discovery (Doc 25) pg. 9, at no. 31., petitioners state,

"Specifically, the documents relevant to plaintiffs' Requests For Inspection which have been either withheld or destroyed by Defendant or which never existed are: etc. Respondent did not produce any of the Revenue Agent's workpapers relevant to the preparation of the Sept. 3, 1987, notice of deficiency mailed to William H. Johnson at 118 East Locust St., Ephrata, PA 17522. The existence of these workpapers is relevant to the disputed issues of whether petitioners had an income tax liability for 1981 or a civil penalty for 1982. Appeals & District Counsel would not support a 2nd notice of deficiency without the workpapers. **App. 49, 51, 54** The number of documents of which petitioners requested inspection, which Respondent did not produce is relevant to the **fraudulent concealment of material facts** relevant to this case. Petitioners' motion (Doc 25) for extension of time for discovery was denied, which included a request for a discovery conference which was ignored by the district court. Petitioners' motion (Doc 33) for *in camera* inspection of withheld discovery documents was ignored by the district court. Petitioners' request (5 SR) for identification of persons pursuant to Fed.R.Civ.P. Rule 26(b)(1) was not responded to by Respondent. None of petitioners' interrogatories or admissions were answered. (19 SR) In support of its motion for summary judgment, Respondent submitted exhibits lettered A to Z. Exhibits B & K are copies of notices of deficiency dated Sept. 3, 1987, for William Johnson & Linda L. Johnson for tax years 1981, 1982 and 1983. No proof of mailing either certified or registered mail was included nor were any Revenue Agent's workpapers included with these exhibits. Exhibits B & K prove that the notices contained addresses known by the IRS to be **invalid** as early as May 7, 1986. Exhibits A,C,F & J are certificates of official record relevant to tax years 1981, 1982 and

1983, for Linda L. Johnson, William H. Johnson and Linda L. & William H. Johnson which indicated that this was a Substitute for Return case dated 06/09/1986, and that a series of assessments started 02/22/1988 and a series of abatements ended 06/20/1994. Exhibit J shows that assessments were made on 03/21/1994, during the period of restrictions pursuant to 26 U.S.C. section 6213. **App. 66** What these exhibits don't show is that the 02/22/1988 assessments were made without valid notices of deficiency for 1981, 1982 and 1983, tax years for William H. and Linda L. Johnson. These assessments were legally unenforceable. Exhibits L to X are relevant to FOIA and include affidavits of Maureen McGovern and Jean S. Pare, two IRS disclosure office employees who were involved in the **fraudulent concealment of material facts.** see **no. 3.** above Exhibit Y is an affidavit relevant to "District Counsel's Response" of IRS senior attorney John Sheffield. Exhibit H is a copy of the Dec.2, 1993, notice of deficiency and Exhibit I is a copy of petitioners' Tax Court petition filed Feb. 22, 1994. A document which wasn't included in these exhibits was a copy of the Tax Court decision entered July 12, 1994, which indicates that petitioners had no deficiencies nor additions to tax for years 1981, 1982 and 1983. Petitioners' opposition (Doc 39) included their statement of material facts no. 1. To no. 87. With reference to their Attachment no. 12., 58 pages of supporting evidence and reference to their Attachment no. 10., 46 pages of supporting evidence. Petitioners make reference at no. 45., to "denied fair hearing." Petitioners make reference at no. 60., to RO Grimes telephone call on 3-23-93. **App. 50** Petitioners supplied the district court with 12 Attachments, a total of 335 pages of supporting evidence, Attachment no. 12., with their opposition (Doc 39). These attachments included: no less than 5 copies of the

"Appeals settlement Memorandum"; 3 copies of the Tax Court decision; 3 copies of Mrs. Johnson's "History"; 3 copies of Mrs. Johnson's "Record of Audit Activity and AIMS Update"; 3 copies of petitioners' July 14, 1986, letter; 2 copies of RO Grimes "Investigation History", Re: 3-23-93; 1 copy each of: Reviewers Report; IRS Memo; Response to Reviewer's Report; and Addendum to 4318. Attachment no. 1, which was filed with petitioners' complaint included all above copies except petitioners' July 14, 1996, letter and RO Grimes "Investigation History", Re: 3-23-93. Petitioners argue that the granting of Respondent's motion for summary judgment was inappropriate before petitioners were able to obtain responses to their discovery requests, *Snook*, 859 F.2d at 866, **2. Federal Civil Procedure,** If documents or other discovery sought would be relevant to issues presented by motion for summary judgment, opposing party should be allowed opportunity to utilize discovery process to gain requested materials. **3. Federal Civil Procedure,** Generally summary judgment is inappropriate when party opposing motion has been unable to obtain responses to his discovery requests. *Parrish*, 533 F.2d at 948, It is horn-book law that a trial court may not grant a motion for summary judgment unless "the basic facts are undisputed and there is no dispute between the parties as to any factual inferences that may be drawn from such facts ..." *Sinderman v. Perry.* Authorities: *Snook v. Trust Co.of Georgia Bank of Savannah, N.A.*, 859 F.2d 865 (11th Cir. 1988) **App. 100;** *WSB-TV v. Lee*, 842 F.2d 1266 (11th Cir. 1988) **App. 105;** *Cowan v. J.C. Penney Co., Inc.*, 790 F.2d 1529 (11th Cir. 1986) **App. 108;** *Murrell v. Bennett*, 615 F.2d 306 (5th Cir. 1980) **App. 111** Petitioners also argue that Respondent failed to carry its initial burden under Fed.R.Civ.P. Rule 56(c)of demonstrating the absence of a genuine issue of

material fact. *See Adickes*, 398 U.S. 144. *Celotex*, 106 S.Ct. at 2552. Authorities: *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, **App. 117;** *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, **App. 119;** *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, **App. 121.**

**.12.** On May 5, 1999, petitioners filed their motion (Doc 48) for judge disqualification pursuant to U.S.C. section 144, together with their affidavit and 61 page Attachment no. 15. of supporting evidence. On July 14, 1999, petitioners' motion for judge disqualification was denied by the district court, (Doc 51). On July 23, 1999, petitioners filed their motion (Doc 52) for reconsideration of the July 14, 1999, district court's order, (Doc 51). On Dec. 15, 1999, the district court filed its order relevant to petitioners' motion, (Doc 52). The district court refers to its application of 28 U.S.C. section 455(a) and incorrectly states that the alleged bias and prejudice in order to be disqualifying "must stem from an extrajudicial sourse, etc." **App. 33** Petitioners argue that based on the record in this case, the district court demonstrated bias in favor of Respondent and prejudice against petitioners in judging this case. That the district court abused its discretion by not disqualifying itself pursuant to 28 U.S.C. section 455(a). Authorities: *U.S. v. Brown*, 539 F.2d 467 (5th Cir. 1976) **App. 132;** *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, (5th Cir. Tex 1983) **App. 132;** *Roberts v. Bailer*, 625 F.2d 125 (6th Cir. 1980) **App.133;** *U.S. v. Alabama*, 828 F.2d 1532, 1538-41 (11th Cir. 1987) **App. 134.**

**.13.** The Court of Appeals affirmed the district court's decision on all counts with the only comment, "We find no merit in any of appellant's challenges. We add a brief word with respect to appellant's claim that the district court should be recused. The claim is baseless. The court went to considerable lengths to afford appellants fair treatment; it certainly did not

give them short shrift." **App. 2** Based on the facts and evidence presented by petitioners in this case, petitioners argue that the Court of Appeals did not apply the proper standards in evaluating the district court's decision to grant Respondent's motion for summary judgment. Authorities; *Combs v. King*, 764 F.2d 818, (11th Cir. 1985) **App. 124;** *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, (11th Cir. 1985), **App. 125;** *Thrasher v. State Farm Fire & Cas. Co.*, 734 F.2d 637 (11th Cir. 1984) **App. 127;** *United States v. Diebold*, 369 U.S. 654 (S.Ct. 1962) **App. 129.**

**.14** Petitioners filed a timely motion for judge disqualification together with their affidavit and 61 pages of supporting evidence. Petitioners filed a motion for reconsideration of their motion for judge disqualification. Both of petitioners motions relevant to judge disqualification were denied by the district court. If trial judge was required to disqualify himself under 28 U.S.C. section 455, but did not, Court of Appeals must reverse judgment and order new trial before different judge, *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, (5th Cir. 1980), **App. 134;** *United States v. Alabama*, 828 F.2d 1532, 1539-41 (11th Cir. 1987)

**.15.** On Jan. 25, 2000, petitioners filed their motion for appointment of a special master and their affidavit, to hold hearings relevant to the IRS disclosure misconduct and Respondent's Trial Attorney's misconduct during district court discovery. Petitioners had received no meaningful hearing within the IRS and no hearing by the district court. On April 24, 2000, the Court of Appeals filed its Order: " Because all of the appellants' substantive claims have been properly dismissed, their motion for appointment of a special master, brought pursuant to Fed.R.App.P. 48, is DENIED as moot. **App. 3** Petitioners argue that they were deprived of their Fifth Amendment right to a

meaningful hearing by the IRS, by the district court and finally by the Court of Appeals.

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## CONCLUSION

For the reasons stated above, William H. Johnson and Linda L. Johnson respectfully request that the Court grant their petition for certiorari.

Respectfully Submitted,
William H. Johnson and
Linda L. Johnson
5158 East Ponce de Leon Avenue
Apartment T
Stone Mountain, Georgia 30083
(404 299-7430
*pro se*

Dated: December 2000

William H. Johnson

Linda L. Johnson

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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| | | |
|---|---|---|
| WILLIAM H. JOHNSON, | : | No. 99-13569 |
| LINDA L. JOHNSON, | : | D.C. Docket |
| Petitioners, | : | 96-01757-CV |
| Versus | : | |
| UNITED STATES OF AMERICA, | : | Filed |
| INTERNAL REVENUE SERVICE, | : | Apr. 24,2000 |
| | : | |

Appeal from the United States District Court
For the Northern District of Georgia

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Before TJOFLAT, EDMONDSON, and HULL,
Circuit Judges

PER CURIAM:

In this appeal, appellants challenge

1) The district court's dismissal of appellants' claim for damages under Section 7433 of the Internal Revenue Code (on the ground that the statute of limitations barred the claim);
2) The district court's ruling that the doctrine of res adjudicata barred appellants' refund claims;
3) The district court's grant of summary judgment for the Government on appellants' Freedom of Information Act claim;
4) The district court's denial of appellants' motion for reconsideration, for stay of judgment pending appeal, and for recusal; and

5) The district court's denial of appellants' motions to compel discovery.

We find no merit in any of appellants' challenges. We add a brief word with respect to appellants' claim that the district court should have recused. The claim is baseless. The court went to considerable lengths to afford appellants' fair treatment; it certainly did not give them short shrift.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 99-13569
Non-Argument Calendar

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D.C. Docket 96-01757-CV-JOF-1

WILLIAM H. JOHNSON,
LINDA L. JOHNSON,

Plaintiffs-Appellants,

Versus

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,

Defendants-Appellees.

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Appeal from the United States District Court
For the Northern District of Georgia

---

ORDER:

Because all of the appellants' substantive claims have been properly dismissed, their motion for the appointment of a special master, brought pursuant to Fed.R.App.P. 48, is DENIED as moot.

"s/ Gerald Brad Tjoflat" .

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | | |
|---|---|---|
| WILLIAM H. JOHNSON and LINDA L. JOHNSON, Plaintiffs, | : | |
| Vs | : | CIVIL ACTION NO 1:96-CV-1757- |
| UNITED STATES OF AMERICA and INTERNAL REVENUE SERVICE, Defendants. | : | JOF Filed Mar. 29,1999 |

**ORDER**

This matter is before the court on plaintiffs' motions to compel discovery [19-1, 20-1], Plaintiffs' motion to serve additional interrogatories [21-1], Plaintiffs' motion for summary judgment [22-1], Plaintiffs motion for extension of time for discovery [25-1], Defendant's motion for sanctions [30-1], Plaintiffs' motion for extension of time to file a consolidated pretrial order [32-1], and Defendant's motion for summary judgment [34-1].

I. **Statement of the Case**

Plaintiffs William H. Johnson and Linda L. Johnson filed a *pro se* complaint against the United States Government on July 11, 1996, alleging nineteen causes of action arising from collection of taxes by the Internal Revenue Service ("IRS") and the State of Georgia. Plaintiffs sought refunds, costs, and damages pursuant to 28 U.S.C. Section 1346(a), 26 U.S.C. Sections 7422, 7430, 7432, and 7433 for unauthorized tax collection actions for 1988, 1989 and 1990. Plaintiffs also requested judicial review of withheld records pursuant to the Freedom of

Information Act ("FOIA"), 5 U.S.C. Section 552(a)(4)(B). On September 13, 1996, Defendant filed a motion to dismiss, arguing that Plaintiffs had not met jurisdictional requirements for these causes of action to proceed in this court. On September 26, 1997, this court issued an order granting in part and denying in part Defendant's motion to dismiss.

In their original complaint, Plaintiffs challenged the practice of the IRS from 1989 through 1991 of placing levies on both their Georgia state income tax refunds and federal income tax refunds for 1988, 1989 and 1990 and applying those refund amounts to federal tax deficiencies owed by Plaintiffs for the years 1981 through 1983. Plaintiffs specifically challenged seven such acts by Defendants, arguing that they were entitled to refunds pursuant to 26 U.S.C. Section 7422 and to corresponding statutory interest on those refund amounts. Reading the complaint and additional materials submitted by Plaintiffs, this court determined that Plaintiffs had not shown sufficient jurisdictional allegations for the court to consider claims for refunds of the Georgia state taxes which Plaintiffs argued were overpaid. (Sept. 26, 1997 Order at 8). However, the court refused to dismiss Plaintiffs' claims of overpayment of federal taxes and allowed these causes of action to continue.
(Id.)

Also in their original complaint, Plaintiffs claimed that Defendant had engaged in an unauthorized collection action in violation of 26 U.S.C. Section 7433 and had improperly failed to release a tax lien in violation of 26 U.S.C. Section 7432. The court read Plaintiffs' pleadings specifically to allege that between 1988 and 1994, six tax liens were filed against them and that these liens were not released until July 29,1994 and May 10, 1995, even though they were unenforceable. (Sept. 29, 1997 Order at 12).

Defendant sought dismissal on the grounds that Plaintiffs had failed to exhaust their administrative remedies as to these claims. The court denied Defendant's motion to dismiss, finding that both parties had provided little more than conclusory allegations as to whether or not Plaintiffs had exhausted their administrative remedies prior to filing in this court.

Finally, Plaintiffs' original complaint alleged that Defendants withheld records in violation of the FOIA relevant to tax years 1981, 1982 and 1983. Defendants again argued in their motion to dismiss that Plaintiffs had failed to exhaust the administrative remedies required as a prerequisite to an action under the FOIA. However, the court found sufficient allegations to allow Plaintiffs' FOIA claim to proceed.

Following the September 26, 1997 Order, both Plaintiffs and Defendants sought leave of the court to amend their pleadings. Both motions were granted on June 16, 1998. In their amended complaint, Plaintiffs sought more clearly to state the facts underlying their claims for damages pursuant to 26 U.S.C. Section 7433 and sought to dismiss their claim against Defendants for failure to release liens in violation of 26 U.S.C. Section 7432. Defendant asserted an additional affirmative defense, that Plaintiffs' 26 U.S.C. Sections 7432 and 7433 claims were barred by the statute of limitations.

Presently, the following of Plaintiffs' causes of action remain before the court: (1) An action for unauthorized collection actions in violation of 26 U.S.C. Section 7433; (2) an action for costs and fees pursuant to 26 U.S.C. Section 7430; (3) an action pursuant to FOIA to compel disclosure of records; and (4) a refund action pursuant to 26 U.S.C. Section 7422 and corresponding request for statutory interest awards for the three overpayments of federal income taxes in

1988, 1989 and 1990 in the amounts of $525.00, $630.00, and $186.09, respectively.

II. **Discussion**

A. Summary Judgment

Summary judgment under Fed.R.Civ.P.56 is appropriate "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To defeat the motion for summary judgment, the nonmoving party must merely present evidence on the basis of which a jury might return a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The nonmoving party in a summary judgment motion is to be given the opportunity to "discover information that is essential to his opposition." *Anderson*, 477 U.S. at 250. Under Rule 56(f) of the Federal Rules of Civil Procedure, a nonmoving party may file an affidavit with the court representing an inability to present facts necessary to oppose the summary judgment motion, and in response the court may "refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Fed.R.Civ.P.56(f).

A party is not required formally to style a discovery request as a Rule 56(f) motion; a pending discovery motion can be sufficient to raise concerns as to whether a party should be permitted additional discovery prior to resolution of a summary judgment motion. *Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 859 F.2d 865, 871 (11th Cir. 1988); *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987); *Phillips v. General Motors Corp.*, 911 F.2d 724, 1990 WL 117981 at ** 5

(4th Cir. 1990). Where there are both pending discovery requests and pending summary judgment motions in a case, it is an abuse of district court discretion to grant the motion for summary judgment without first considering the discovery motions. *Snook*, 859 F2d at 871; *Webb v. Bunch*, 16 F.3d 1223, 199[illegible] WL 36854 (6th Cir. 1994).

A district court considering summary judgment motions along with discovery requests should look at factors such as whether the nonmoving party has sufficiently identified the information sought through discovery, the reasons the information has not yet been obtained, and the materiality of the requested information to the summary judgment motion. *Phillips*, 1990 WL at **5. Where the documents are relevant to the summary judgment motion and are discoverable, the district court should rule on the discovery motions before the summary judgment motion. *Snook*, 859 F.2d at 871. However, where a nonmoving party has made no showing of specific evidence expected to be obtained through discovery and has not shown how such evidence will impact the pending summary judgment motion, a ruling on the summary judgment motion is not precluded. *Patterson v. United States Postal Service*, 901 F.2d 927, 929 (11th Cir. 1990); *Public Service Co. of Colorado v. Continental Casualty Co.*, 26 F.3d 1508, 1518 (10th Cir. 1994); *International Corp. v. Welch Foods, Inc.*, 13 F.3d 478, 488 (1st Cir. 1994). Broad discovery requests generally are not sufficient to prevent the court from ruling on a summary judgment motion. *See Phillips*, 1990 WL at **5; *Garrett*, 818 F.2d at 1518.

Currently pending before the court are summary judgment motions submitted by both Plaintiffs and Defendants, as well as numerous discovery motions submitted by Plaintiffs. The court will first consider Plaintiffs' discovery motions, taking into consideration

the impact the information requested has on Plaintiffs' response to Defendant's motion for summary judgment.

B. Plaintiffs' Discovery Motions

Plaintiffs' first motion to compel seeks inspection of certain documents which Plaintiffs included in their request for production of documents served on Defendant. Plaintiffs requested documents such as IRS policy statements, documents relating to particular IRS projects, and information relating to complaints filed by Plaintiffs. Plaintiffs claim that Defendant objected to these various requests on the basis of relevancy, and on the basis that some documents would contain information pertaining to taxpayers other than Plaintiffs.

Plaintiffs' second motion seeks to compel Defendant to permit inspection of certain documents. Plaintiffs cite ten requests that were served upon Defendant which they claim were not satisfied. The documents Plaintiffs request are various internal documents of the IRS, such as memoranda transmitting Plaintiffs' files between offices, documents and files relating to the mailing of deficiency notices to Plaintiffs, documents and files relating to the rejection of Plaintiffs' Offer in Compromise submitted to the IRS, and documents pertaining to Plaintiffs' petition filed in the Tax Court. Plaintiffs claim that Defendant objected to these requests under the explanation that they were not relevant or reasonably calculated to lead to admissible evidence, and that certain documents were protected by the attorney-client privilege or the deliberative process privilege.

In both motions to compel, Plaintiffs give the same reasoning in support of each request for production. They argue that the documents they

request would "demonstrate evidence of routine practice by the Internal Revenue Service and demonstrate bias and prejudice in the treatment of the Plaintiffs relevant to the examination and collection of federal taxes for tax years 1981, 1982 and 1983." Plaintiffs argue that therefore the documents they request constitute relevant evidence.

Having read and considered Plaintiffs motions to compel production of documents and Defendant's responses thereto, the court cannot find that Plaintiffs are entitled to relief. They have shown no connection between the documents they request and any specific cause of action brought against Defendant. In addition, Defendant represents that many of the documents requested have already been provided to Plaintiffs and those which were refused either do not exist or are not relevant to the claims asserted in the instant case. Finally, the court finds that Plaintiffs have not represented to the court that any information sought in the requested documents would have any impact on the motions for summary judgment pending before the court. Therefore, Plaintiffs' motions to compel are DENIED.

2. *Motion for Leave to Serve Additional Interrogatories*

Plaintiffs filed a motion for relief from the interrogatory limitation. They assert that they misunderstood the terms "interrogatory" and "party" under the Local Rules and the Federal Rules of Civil Procedure and mistakenly filed 146 interrogatories upon Defendant. They now request leave to properly serve all 146 interrogatories or such other number as the court sees fit. Defendant responded to Plaintiffs' motion, citing the limitations of both the federal and local rules and their objection to both the number and substance of Plaintiffs' interrogatories.

Neither party has provided the court with a copy of

the interrogatories Plaintiffs' seek to have answered by Defendant, and neither has informed the court which, if any, of Plaintiffs' initial interrogatories were answered. The court therefore cannot determine whether there is cause to permit Plaintiffs to exceed the limitations provided in the federal and local rules. Accordingly, Plaintiffs motion for relief from interrogatory limitation is DENIED.

C. Defendant's Motion for Summary Judgment

Defendant filed a motion for summary judgment as to all of Plaintiffs' causes of action on June 2, 1998. Plaintiffs filed an opposition to Defendant's statement of facts not in dispute on June 5, 1998 and an opposition to Defendant's summary judgment motion on June 19, 1998. The parties agree to the following undisputed facts. 1 The IRS made assessments of federal income taxes, interest and penalties against Plaintiffs during the years 1981, 1982 and 1983. In 1988, 1989 and 1990, Plaintiffs filed Form 1040 income tax returns which reported overpayments of $525.00, $630.00 and $186.09, respectively. Plaintiffs overpayment of 1988 federal income taxes in the amount of $539.43 was applied to the income tax liability assessed by the IRS for 1981. 2 Plaintiffs' overpayment in 1989, in the amount of $652.94 was also applied to Plaintiffs' tax liability as assessed by the IRS for 1981.

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1 Under Local Rule 56.B(2), all material facts contained in Defendant's statement of material facts which were not specifically controverted in Plaintiffs' response are deemed to have been admitted.

2 In their response to Defendant's statement of facts, Plaintiffs dispute the fact that a tax liability was actually owed to the IRS during the years of 1988, 1989 and 1990 but do not dispute the fact that the

Plaintiffs' overpayment for 1990 in the amount of $186.09 was applied to a civil penalty assessed by the IRS for the year 1982. The IRS sent a notice of deficiency to Plaintiffs on December 2, 1993 listing the amounts of deficiency assessed for the years 1981, 1982 and 1983. On February 24, 1994, Plaintiffs filed a petition in the United States Tax Court requesting a redetermination of the deficiencies as determined by the IRS and reflected in the December 2, 1993 notice of deficiency. On July 12, 1994, pursuant to an agreement of the parties, the Tax Court entered an order "[t]hat there [we]re no deficiencies in income tax due from, nor overpayment due to, the petitioners for the taxable years 1981, 1982 and 1983." The activities which form the basis for Plaintiffs' 26 U.S.C. Section 7433 claim for unauthorized collection occurred between September 2, 1988 and March 21, 1994.

Plaintiffs made numerous requests for documents under the FOIA with respect to taxable years 1981 through 1983. On February 4, 1985, Plaintiffs were given 107 pages of examination documents for the years 1981, 1982 and 1983 from the Philadelphia Disclosure Office. The Atlanta Disclosure Office gave Plaintiffs 90 pages of documents on December 17, 1990, 418 pages on February 6, 1991, 347 pages on February 13, 1991, 4 pages on April 15, 1991, and 165 pages on May 9, 1992. On December 15, 1995, Plaintiff Linda L. Johnson submitted a FOIA request, and Disclosure Specialist Maureen McGovern conducted a search for documents responsive to that request. Mrs. Johnson's request asked for "all examination files for tax years 1981, 1982 and 1983." In accessing Mrs. Johnson's individual master file account ("IMF"), Ms. McGovern necessarily accessed

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2 overpayments were used to satisfy these liabilities claimed by the IRS.

Mr. Johnson's records as well, as Jointly filed documents are listed under the husband's social security number on the IMF. Ms. McGovern thus conducted a search of all documents listed under Mr. Johnson's IMF account as well. Ms. McGovern then provided Mr. and Mrs. with all releasable documents from both their IMF accounts. Ms.McGovern ordered all documents listed as applicable to Plaintiffs from the IRS Service Centers and Federal Records Center and analyzed all such documents that had not already been destroyed to determine whether they could be released pursuant to 5 U.S.C. Section 522(b). Ms McGovern then withheld and redacted some documents and notified Mrs. Johnson that the remaining documents were subject to disclosure by letter March 14, 1996. On March 20, 1996, Mr. Johnson also filed a FOIA request for all examination materials for years 1981, 1982 and 1983 which were indexed under his social security number. On March 25, 1996, the Disclosure Office notified Mr. Johnson by letter that all documents available for both him and Mrs. Johnson in the March 14, 1996 response to her FOIA request. Mr. Johnson sent another FOIA request. reiterating his initial request, to Atlanta District Disclosure Office on April 1, 1996, and again the office responded, by letter dated April 4, 1996, that all available records had already been disclosed.

1. *26 U.S.C. Section 7422 Claims*

Plaintiffs' claim for refund under 26 U.S.C. Section 7422 rests on the alleged illegality of the February 28, 1988 assessments of income tax deficiencies made against them for the years 1981, 1982 and 1983. Plaintiffs argue that Defendant violated 26 U.S.C. Section 6212, which requires that a notice of deficiency be provided to a taxpayer by certified or

registered mail at his last known address before any deficiency proceedings are undertaken. Plaintiffs argue that no such notice of deficiency was provided to them prior to the assessment. Plaintiffs thus argue that the assessments of deficiencies were illegal, and that any overpayments made which were applied to satisfy these deficiencies should be refunded. Defendant asserts that the issue of whether Plaintiffs are entitled to refunds for overpayments made in 1988, 1989 and 1990 was already decided by the Tax Court, and that decision should be given effect as *res judicata*. Defendant argues that the overpayments in 1988, 1989 and 1990 were in fact allowed and properly applied to satisfied income tax liabilities assessed for years 1981, and 1982 under 26 U.S.C. Section 6402(a), which allows the IRS to credit the amount of any overpayment against liabilities for income tax on the part of the person who made the overpayment. Defendant contends that because the Tax Court entered its decision on July 12, 1994, after the overpayments were applied to the tax liabilities, and determined that no overpayments were due to be refunded to Plaintiffs, that this court has no jurisdiction to review that decision under the doctrine of *res judicata*.

The doctrine of *res judicata* requires: (1) that the issue litigated in both proceedings be identical; (2) that the parties to the proceeding are the same as or are privity with the parties to the earlier proceeding; and (3) that the earlier proceeding resulted in a final judgment on the merits. *Baptise v. Commissioner*, 29 F3d 1533, 1539 (11th Cir. 1994); *Nevada v. United States*, 463 U.S. 110 (1983). After consideration of the issues litigated before the Tax Court and the cause of action presently before this court, the court finds that the Tax Court decision is *res judicata* in the instant action.

First, the court finds that the issue litigated in the earlier proceeding before the Tax Court is identical to the issue presently before the court. Plaintiffs received a notice of deficiency from the IRS on December 2, 1993 which listed deficiencies in their income tax payments in the following amounts: $13,338.00 for tax year 1981; $7,012.00 for tax year 1982; and $15,483.00 for tax year 1983. Plaintiffs filed a petition with the United States Tax Court on February 22, 1994 requesting a redetermination of the deficiencies set forth in the December 2, 1993 notice. In support of their petition to the Tax Court, Plaintiffs set forth the following facts and contentions. They alleged first that on September 3, 1987, the IRS deliberately mailed notice of an income tax deficiency to an incorrect address where they knew Plaintiffs would not receive the notice and that the IRS had failed to exercise due diligence in obtaining the correct address as required by the Internal Revenue Code. They contended that because this original notice was defective, the assessment made on February 22, 1988 was illegal and that all action taken on the basis of that assessment of liability was consequently unauthorized. Specifically, Plaintiffs complained that the IRS had wrongfully seized their federal tax refunds for the years 1988, 1989 and 1990 and applied these overpayments to the illegal deficiency. Although Plaintiffs acknowledged receiving notice of the deficiency through the December 2, 1993 letter, they complained that such notice was sent "out of time." On June 12, 1994, the Tax Court issued an order pursuant to an agreement between the parties. The court stated that "[t]here [we]re no deficiencies in income tax due from, nor overpayments due to, the petitioners for the taxable years 1981, 1982 and 1983."

The court finds that Plaintiffs' 26 U.S.C. Section

7422 claim presently before the court, which requests refunds of overpayments made in the years 1988, 1989 and 1990 which were applied to deficiencies for tax years 1981, 1982 and 1983 is identical to the issue raised by Plaintiffs in their petition to the Tax Court filed February 22, 1994. Plaintiffs' causes of action brought before the Tax Court and before this court both rely on the theory that the overpayments were wrongfully applied to deficiencies which were calculated on the basis of an illegal assessment. This issue was resolved pursuant to the settlement of the parties as reflected in the July 12, 1994 order of the Tax Court.

Second, the court finds the privity element of the doctrine of *res judicata* satisfied. The Commissioner of the IRS, the party named in Plaintiffs' original petition to the Tax Court, and the United States, the Defendant in the instant action are in privity for purposes of *res judicata*, for the IRS had the authority to represent the interests of the United States in a final adjudication of the issues before the Tax Court. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1939).

The final issue is whether *res judicata* applies in the context of a Tax Court decision entered pursuant to an agreement between parties, and whether such an order constitutes a judgment on the merits for purposes of the doctrine. *Res judicata* is applicable to the federal income tax field and litigation conducted in the Tax Court. *Commissioner v. Sunnen*, 333 U.S. at 591 (1947). Further, a Tax Court judgment entered pursuant to an agreement between the parties constitutes a judgment on the merits for purposes of *res judicata*, "whether or not the basis of the agreements on which [it] rest[s] reached the merits." *Baptiste*, 29 F.3d at 1539-40, *quoting United States v. International Building Co.*, 345 U.S. 502 (1953). Accordingly, even though the court is unable to

determine from the record whether the agreement reached between the parties before the Tax Court was reached on the basis of the merits of Plaintiffs' contentions or some other collateral consideration, the judgment entered on the basis of the parties' agreement and consent acts as a final judgment on the merits. *International Building*, 345 U.S. at 506.

The elements of the doctrine of *res judicata* are satisfied in the instant case, and the court finds that the parties have already litigated and resolved the issue of whether Plaintiffs' income tax overpayments for 1988, 1989 and 1990 were properly held and applied to deficiencies assessed for the years 1981, 1982 and 1983. Accordingly, the court does not have jurisdiction again to consider Plaintiffs' cause of action brought under 26 U.S.C. Section 7422 for refunds of 1988, 1989 and 1990 overpayments. Therefore, Defendant's motion for summary judgment as to Plaintiffs' Section 7422 claims is GRANTED.

2. *26 U.S.C. Section 7433 Claims*

Defendant next argues that summary judgment should be granted in its favor because Plaintiffs' 26 U.S.C. Section 7433 claim is barred by the statute of limitations. Defendant asserts that Section 7433(d)(3) requires that an action be filed within two years after the date a cause of action accrues, and that the acts Plaintiffs allege as the basis for their Section 7433 claim occurred earlier than two years prior to the filing of the instant case. Plaintiffs argue in response that their right of action did not accrue until the Tax Court decision was entered, because they did not have all the essential elements of a possible cause of action until that date. The Tax Court order was entered July 12, 1994, and therefore Plaintiffs argue that their filing on July 11, 1996 was timely.

Plaintiffs submitted an amended complaint to

amend their Section 7433 cause of action to include an itemized list of illegal collection activities. Plaintiffs list 35 acts that they argue occurred without a legally enforceable assessment, all 35 of which occurred on or before March 21, 1994. Section 7433 provides for civil actions for damages arising out of certain unauthorized collection actions. Such an action "may be brought ... only within 2 years after the date the right of action accrues." 26 U.S.C. Section 7433 (d)(1). The Treasury Regulations promulgated under Section 7433 further provide that "[a] cause of action ... accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action." 26 C.F.R. Section 301.7433-1(g)(2). In response to Defendant's motion for summary judgment, the court must determine whether, as a matter of law, the statute of limitations provided in Section 7433 had already expired when Plaintiffs filed the instant action on July 11, 1996.

The court must first determine which acts of the IRS Plaintiffs are entitled to assert as bases for their Section 7433 action. In their amended complaint, they lists various types of acts, including provision of notice of liens, "extortion" of form 1040 returns, seizure of refunds, enforcement of levies, notices of intent to levy, and assessments of tax due. However, not all acts by the IRS are actionable under Section 7433. Assessment and determination of an amount of tax cannot form the basis of an action under Section 7433. *See Shaw v. United States*, 20 F.3d 182, 184 (5th Cir. 1994). In *Shaw* the Fifth Circuit explained the distinction between assessment and collection activities in relation to Section 7433; that "improper assessment deals with the decision to impose tax liability while improper collection activities involve conduct of an agent trying to collect the taxes owed." *Id.* 184. Relying on legislative history, the court stated

that because Section 7433 created a cause of action for improper *collection* of a tax, that "[a]n action under [Section 7433] may not be based on an alleged reckless or intentional disregard in the connection with the *determination* of a tax," and that accordingly "a taxpayer cannot seek damages under Section 7433 for an improper assessment of taxes." *Id.* At 184 (citations omitted). *See also Miller v. United States,* 66 F.3d 220, 222-23 (9th Cir. 1995) (in challenge to jeopardy assessment made by IRS, summary judgment in favor of IRS on taxpayer's Section 7433 claim was appropriate because assessment and tax determination part of jeopardy assessment process is not a " collection action" within the meaning of Section 7433); *Gonsalves v. Internal Revenue Service,* 975 F.2d 13, 15-16 (1st Cir. 1992) (summary judgment appropriately granted to IRS because action under Section 7433 cannot be based on actions in connection with determination of a tax).

Although actions in connection with assessment and determination are not actionable under Section 7433, notice and demand requirements of collection procedures may be. *See Miller,* 66 F.3d at 222. Though not clearly set forth in their complaint, the court reads Plaintiffs' Section 7433 cause of action to allege that notice was improper in their case because it was not sent to their last known address and because certain deficiencies were sent out of time. (See Pls.' Amended Complt.) Plaintiffs acknowledge that some activities them assert as wrongful collection activities occurred before the effective date of Section 7433, November 10, 1998. In particular, it appears that the notices Plaintiffs complain were improperly not sent to their last known address were issued in September 1987. ("Appeals Settlement Memorandum, page 2, attached to Pls.' Mot. For Summ. J.). Accordingly, Plaintiffs' claim that particular notices were not sent to their last

known address is not actionable under Section 7433.

Plaintiffs also state that notices of deficiencies for years 1981-1983 were filed out of time. As set forth in the undisputed facts, this notice was sent to Plaintiffs on December 2, 1993. Also, Plaintiffs assert that certain notices of tax liens were improperly filed during a period of restriction on January 3, 1994. The court finds these allegedly defective notices of December 2, 1993 and January 3, 1994 actionable under Section 7433. 3 The court thus turns to whether the action was timely filed.

A cause of action under Section 7433 is generally established when an allegedly unauthorized collection action occurs. *See Caprasco v. Commissioner of Internal Revenue,* 907 F. Supp. 1235, 1240 (N.D. Ind. 1995); *United States v. Mansour,* 1997 WL 718456 at *3 (D.Conn. 1997); *Sylvester v. United States,* 978 F. Supp. 1186, 1190 (E.D. Wis. 1997). The latest date for collection actions Plaintiffs assert as the basis for their Section 7433 claim occurred on January 3, 1994. The assumption therefore is that the two-year period of limitations began to run at that time, expiring January 3, 1996.

However, some courts have found the period of limitations to begin running sometime after the collection action, taking into account the Treasury Regulation Section 301.7433-1(g)(2), which allows a

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Note 3 In Plaintiffs' amended complaint, the acts they set forth as constituting illegal collection activities in violation of Section 7433 extended through March 3, 1994. However, the events listed as occurring on that date were assessments, which as discussed above cannot be relied upon for an action under Section 7433. The next most recent dates of activities set forth by Plaintiffs are the notices of January 3, 1994.

taxpayer a reasonable time to discover the elements of the action. *See, e.g. Sylvester,* 978 F. Supp. At 1191 (allowing action to proceed on plaintiff's argument that although collection actions occurred outside period of limitations, plaintiff did not receive IRS file until later date and thus could not have discovered information essential to claim); *Cunningham v. United States,* 165 B.R. 599, 605 (N.D. Tex. 1993) (denying summary judgment on basis that limitations had not run as a matter of law because plaintiffs had received documents relating to the challenged assessments more than two years after the date of the assessments).

However, although a taxpayer has a reasonable time to discover the elements of a Section 7433 cause of action, where there is evidence that a party was actually aware of a cause of action, some courts consider the statute of limitations to begin running at that time. For example, in *Stjernholm v. Patterson,* 85 F.3d 641, 1996 WL 238296 (10th Cir. 1996), a tax liability was established against the plaintiffs in 1991. The Government then seized property from the plaintiffs in April 1992 and sold that property at action in June 1992. The Plaintiffs commenced an action under Section 7433 in October 1994. Plaintiffs argued that their cause of action under Section 7433 was timely because it was filed within two years of their receipt of final notice from the IRS that their claims for refunds had been disallowed. 4 In rejecting the plaintiffs' argument, the Tenth Circuit relied on the fact that the plaintiffs had published a "public notice" in August 1992 in a newspaper reflecting their opinion that the IRS had committed procedural violations in conducting the sale and seizure of their property and

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Note 4 The plaintiffs in that case relied on *Gonsalves v. United States,* 782 F. Supp. 164 (D. Me. 1994),

had engaged in illegal activities. *Id.* At *2. The court held that the publication of the public notice "plainly show[ed] that [the plaintiffs] then knew all essential elements of their claim." *Id. See also Anderson v. Zenali,* 1996 WL 628180 at *3-4 (C.D. Cal. 1996), aff'd, 129 F.3d 124 (9th Cir. 1997) (finding that, in case involving challenge to IRS sale of property, statute of limitations began to run at the latest on the date plaintiffs brought action for quiet title because " it [w]as disingenuous for plaintiffs to argue that they did not have a reasonable opportunity to discover that they were harmed by the sale ...when they had already instituted a suit against the purchaser of the property").

Plaintiffs argue that their cause of action did not accrue until the decision of the Tax Court, rendered July 12, 1994, and that thus their period of

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Note 4 *aff'd,* 975 F.2d 13 (1994), where the court held that the two-year statute of limitations for Section 7433 claims did not begin to run until the plaintiff had received legal notice from the IRS that his claims for refunds were fully disallowed. In *Gonsalves,* the collection actions complained of occurred in 1987 and 1988, but plaintiff did not receive notice that his claims for refunds were fully disallowed until January 1990. *Id.* At 169. The plaintiff then filed his Section 7433 action in March 1991, and the court allowed it to proceed, holding that the two-year period of limitations began to run in January 1990. *Id.* The Tenth Circuit in *Stjernholm* rejected the plaintiff's argument that the reasoning of *Gonsalves* should apply, because C.F.R. Section 301.7433-1(g)(2) had been enacted since that decision and indicated that a cause of action under Section 7433 was considered to accrue after a reasonable opportunity to discover all elements of the claim. *Stjernholm,* 1996 WL 238296 at *2.

limitations for their Section 7433 action extended until July 12, 1996. The court disagrees. Given the extensive litigation and discovery that had been conducted between Plaintiffs and the IRS prior to July 12, 1994, the court finds that Plaintiffs had a reasonable opportunity to discover the elements of their Section 7433 action. Plaintiffs have offered no explanation as to what events on July 12, 1994 allowed them to discover the elements of their action or permitted their action to accrue. The court therefore has no reason to find that Plaintiffs were unable to discover that the notices provided in December 1993 and January 1994 may have given rise to a cause of action for improper collection procedures. Further, there is evidence that Plaintiffs were actually aware of the elements of their cause of action under Section 7433 prior to July 12, 1994. Plaintiffs filed a petition with the Tax Court on February 22, 1994 stating that the December 2, 1993 notice had been wrongfully sent out of time. (Tax Court Petition at M, submitted with Def.'s Resp. to Pls.' Mot. For Summ. J.). Therefore, there is evidence that at least as early as February 22, 1994 Plaintiffs understood and were aware of the elements of their potential Section 7433 claims.

In light of the evidence of Plaintiffs' actual knowledge as well as the history of the extensive communication and discovery between the parties in this case, the court finds no reason to extend the time for accrual of Plaintiffs' Section 7433 cause of action until July 12, 1994. The court therefore concludes that Plaintiffs' 26 U.S.C. Section 7433 action was untimely. Defendant's motion for summary judgment as to Plaintiffs' Section 7433 claim is GRANTED.

3. *FOIA Claim*

Plaintiffs' original complaint requested judicial review pursuant to 5 U.S.C. Section 552(a)(4)(B) of the

IRS's withholding of records which Plaintiffs argue are not exempt from disclosure. Plaintiffs also claim that the IRS has not responded to their FOIA "administrative appeal" of April 23, 1996.Defendant argues that it has fully complied with the FOIA and thus moves for summary judgment on Plaintiffs' FOIA claim.

Title 5, U.S.C. Section 552(a)(4)(B) authorizes a district court to enjoin an agency from withholding records and order production of those records to a complainant under the FOIA. However, the court has granted Defendant's motion for summary judgment on both of Plaintiffs' remaining claims under 26 U.S.C. Sections 7422 and 7433. Accordingly, Plaintiffs no longer have a need for additional discovery from Defendant. Defendant's motion for summary judgment accordingly is GRANTED.

D. Plaintiffs' Motion for Summary Judgment

Plaintiffs filed a motion for summary judgment on their cause of action for refund of federal taxes pursuant to 26 U.S.C. Section 7422. As discussed above, Plaintiffs' claim under Section 7422 is governed by the doctrine of *res judicata* and the decision of the Tax Court entered on the action between the parties to the instant case on July 12, 1994 is given preclusive effect. Accordingly, Plaintiffs' motion for summary judgment is DENIED.

E. Defendant's Motion for Sanctions

Defendant filed a motion for sanctions on May 22, 1998 pursuant to Fed.R.Civ.P.37(d) against Plaintiffs for failure to appear at their depositions. Defendant contends that on May 5, 1998 a notice of deposition was served upon the Plaintiffs, but that both Plaintiffs failed to appear at their scheduled depositions on May 12, 1998. Defendant asserts that when Plaintiffs were

contacted regarding their failure to appear, the only explanation was that they had not been served with subpoenas. Defendant requests that the court dismiss Plaintiffs' action pursuant to Fed.R.Civ.P.Rule 37(b)(2)(C0 and order that Plaintiffs pay the expenses and reasonable attorneys' fees incurred as a result of the attempted depositions.

Plaintiffs filed a response to Defendant's motion on June 4, 1998 in which they cited numerous instances in which they argue Defendant's counsel was uncooperative with them and failed to disclose certain documents as requested. Plaintiffs do not respond directly to Defendant's allegations that they refused to attend their depositions, but accuse Defendant's counsel of other instances of misconduct.

Having been read and considered and taking into account the fact that Defendant has been awarded summary judgment in the instant case, Defendant's motion for sanctions is DENIED.

F. Motion to Extend Time for Discovery and Time to File Consolidated Pretrial Order

Remaining before the court are Plaintiffs' motions to extend time for discovery and extend time in which to file a consolidated pretrial order. As discussed above, the court has awarded summary judgment in favor of Defendant on all Plaintiffs' remaining claims. Accordingly, Plaintiffs' motions to extend time for discovery and extend time in which to file a consolidated pretrial order are DENIED as moot.

III. **Conclusion**

Plaintiffs' motions to compel discovery [19-1, 20-1] and motion to serve additional interrogatories [21-1] are DENIED. Plaintiffs' motion for summary judgment [22-1] is also DENIED. Defendant's motion for summary judgment [34-1] is GRANTED, and Defendant's motion for sanctions [30-1] is DENIED. Finally, Plaintiffs' motion for extension of time for discovery [25-1] and motion for extension of time to file a consolidated pretrial order [32-1] are DENIED as moot.

SO ORDERED this 29th day of March 1999.

"s/ J. Owen Forrester" .
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVIAION**

| | | |
|---|---|---|
| WILLIAM H.JOHNSON and LINDA L. JOHNSON, | : | |
| Plaintiff, | : | CIVIL ACTION |
| Vs. | : | FILE NO. |
| | : | 1-96-cv-1757- |
| UNITED STATES OF AMERICA and INTERNAL REVENUE SERVICE, | : | JOF |
| Defendants. | : | |

**JUDGMENT**

This action having come before the court, Honorable J. Owen Forrester, United States District Judge, for consideration of defendant's Motion for Summary Judgment, and the court having granted said motion, it is

**Ordered and Adjudged** that the plaintiff take nothing; that the defendants recover its costs of this action, and the action be, and the same hereby, is **dismissed.**

Dated at Atlanta, Georgia, this 30th day of March, 1999.

LUTHER D. THOMAS
CLERK OF COURT
By: "s/ Wendy S. Evens" .
Deputy Clerk

Prepared, Filed, and Entered
In the Clerk's Office
March 30, 1999
Luther D.Thomas
Clerk of Court
By "s/ Wendy S. Evans" .
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| WILLIAM H.JOHNSON and | : | |
| LINDA L.JOHNSON, | : | |
| Plaintiffs. | : | |
| Vs. | : | CIVIL ACTION NO |
| | : | 1: 96-CV-1757- |
| UNITED STATES OF AMERICA and: | | JOF |
| INTERNAL REVENUE SERVICE, | : | Filed |
| Defendants. | : | July 14, 1999 |

**ORDER**

This matter is before the court on Plaintiffs' motion for reconsideration [45-1]. Plaintiffs' motion for stay of judgment pending appeal [46-1], and Plaintiffs' motion for judicial disqualification [48-1].

This court granted summary judgment in favor of Defendants in the instant case on March 29, 1999. Plaintiff then filed a motion for reconsideration on April 12, 1999. Motions for reconsideration should not be filed as a matter of practice, but only when necessary. *See* LR7.2E. A motion for reconsideration is not a vehicle to present the court with arguments already heard and dismissed. *See Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996); *Caisse Nationale de Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996); *Van Skiver v. United States*, 952 F.2d 1241, 1243-44 (10th Cir. 1991), *cert. denied*, 506 U.S. 828 (1992); *United States v. Williams*, 674 F.2d 310, 313 (4th Cir. 1982). A motion that simply asks the district court to change its mind is not authorized by Rule 60. *Williams*, 674 F.2d at 313. Further, it is not appropriate to raise new arguments in a motion for reconsideration that could have raised

when the matter was initially before the court. *Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990); *VanSkiver*, 952 F.2d at 1243. *See also Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 916 F.Supp. 1557, 1560 (N.D. Ga. 1995) (O'Kelley, J.) ("a motion for reconsideration is not an opportunity for the moving party and their counsel to instruct the court on how the court 'could have done it better' the first time. Rather, the motion should be reserved for certain limited situations, namely the discovery of new evidence, an intervening development or change in the controlling law, or the need to correct a clear error or prevent a manifest injustice").

The court finds Plaintiffs' motion for reconsideration to be without merit. Plaintiffs have in large part presented the court with arguments already heard and dismissed. Further, although Plaintiffs have pointed to certain clerical errors and minor mistakes made by the court in its Order, such errors are not sufficient to warrant reconsideration of this court's grant of summary judgment in favor of Defendants. Accordingly, Plaintiffs motion for reconsideration is **DENIED.**

Plaintiffs filed a motion on April 19, 1999, requesting this court to stay its entry of judgment in the instant case pending appeal. They cite the court to the fact that a motion for reconsideration was pending in this court at the time the motion was filed. Plaintiffs may appeal this court's grant of summary judgment in accordance with the Federal Rules of Appellate Procedure. To the extent Plaintiffs are concerned about the timeliness of their appeal in light of the time during which their motion for reconsideration has been pending, the court refers Plaintiffs to Rule 4(a)(4) of the Federal Rules of Appellate Procedure. Having been read and considered,

Plaintiffs' motion for stay pending appeal is **DENIED.**

Finally, Plaintiffs ask that the undersigned recuse himself from the instant case due to a bias in favor of Defendant. Pursuant to 28 U.S.C. Section 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The standard under Section 455 is objective and requires the court to ask "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) (citations omitted). Under 28 U.S.C. Section 455, it is well settled that the allegation of bias must show that " the bias is personal as distinguished from judicial in nature." *United States v. Phillips*, 664 F.2d 971, 1002-03 (5th Cir. Unit B 1981), *superseded on other grounds, United States v. Huntress*, 956 F.2d 1309 (5th Cir. 1992); *Phillips v. Joint Legislative Com., etc.*, 637 F.2d 1014, 1019-20 (5th Cir. 1981). As a result, except where pervasive bias is shown, a judge's rulings in the same or a related case are not a sufficient basis for recusal. *Phillips*, 664 F.2d at 1002-03.

Plaintiffs' motion offers no factual evidence of the type of personal bias that would sustain a doubt about the court's impartiality and require recusal. Plaintiffs base their motion solely upon their disagreement with this court's ruling in a prior order.

recusal, however , is not required simply because Petitioner disagrees with the court's handling of the case. *See Hepperle v. Johnston,* 590 F.2d 609, 613-14 (5th Cir. 1979). Further, Plaintiffs' dissatisfaction with the undersigned's judicial decisions and performance in this case is not a sufficient legal basis for recusal. *Id.; Fowler,* 669 F.Supp. at 928-29. Accordingly, Plaintiffs' motion for disqualification is **DENIED.**

For the foregoing reasons, Plaintiffs motions for reconsideration [45-1], for stay of judgment pending appeal [46-1] and for judicial disqualification [48-1] are all **DENIED.**

**SO ORDERED** this 13th day of July 1999.

"s/ J. Owen Forrester" .
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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|---|---|---|
| WILLIAM H.JOHNSON and | : | |
| LINDA L.JOHNSON, | : | |
| Plaintiffs. | : | |
| Vs. | : | CIVIL ACTION NO |
| | : | 1:96-CV-1757- |
| UNITED STATES OF AMERICA and | : | JOF |
| INTERNAL REVENUE SERVICE, | : | Filed |
| Defendants. | : | Dec. 15, 1999 |

**ORDER**

This matter is before the court on Plaintiffs' motion for reconsideration [52-1].

Plaintiffs request this court's reconsideration of its Order issued July 14, 1999 denying their request for reconsideration of this court's order granting summary judgment in favor of Defendant on the merits of the instant action, denying their motion for stay of judgment pending appeal, and denying their motion for disqualification of the undersigned. In the instant motion, Plaintiffs challenge this court's previous order on two grounds.

First, they challenge this court's judgment, entered March 30, 1999, in which it was ordered that Plaintiffs take nothing and that Defendant recover the costs of the action. Plaintiffs claim that this court's order that Defendant recover the costs of this action is in violation of their rights to due process because Defendant did not request recovery of its costs. Second, they complain that this court misconstrued their motion for disqualification of the undersigned as a motion brought pursuant to 28 U.S.C. Section 455(a) Rather than 28 U.S.C. Section 144.

Having read and considered Plaintiffs' motion and Defendant's response, the court finds Plaintiffs' motion for reconsideration to be without merit.

As to Plaintiffs' complaint with this court's award of recovery of coats "on its own initiative" absent such a request by Defendant, the court refers Plaintiffs to Fed.R.Civ.P.54(d)(1) ("Except when express provision thereto is made either in a statute of the United States or in these rules, costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs ..."). Further, the court notes that Defendant has represented that it will not seek costs from Plaintiff. Plaintiffs' challenge to this court's judgment is accordingly moot.

Next, the court finds Plaintiffs' challenge to this court's application of 28 U.S.C. Section 455(a) to their motion for disqualification insufficient to warrant reconsideration of this court's order denying relief.

It is well settled that under either Section 144 or Section 455 an allegation of bias sufficient to require disqualification must demonstrate that the bias is personal as distinguished from judicial in nature. The alleged bias and prejudice, in order to be personal and disqualifying, "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

*Jaffe v. Grant*, 793 F.2d 1182, 1188-89 (11th Cir. 1986) (*quoting United States v. Phillips*, 664 F.2d 971, 1002-03 (5th Cir. 1981); *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). *See also United States v. Meester*, 762 F.2d 867, 884 (11th Cir. 1985). This court found in its previous order that Plaintiffs' allegations of bias related to this court's previous rulings in the instant case and were supported with no factual

evidence of personal bias against them. Plaintiffs have offered no evidence to change the outcome of the ruling on their motion; they simply challenge this court's application of 28 U.S.C. Section 455(a) rather than 28 U.S.C. Section 144. The standard under either section for purposes of Plaintiffs' motion, however, is the same.

Further, the court finds that Plaintiffs were not prejudiced by this court's application of 28 U.S.C. Section 455(a) rather than 28 U.S.C. Section 144 to their motion for disqualification. The Eleventh Circuit has recognized that passing 28 U.S.C. Section 455, "Congress broadened the grounds and loosened the procedure for disqualification in federal courts." *United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987). Plaintiffs' claim was analyzed under an arguably less rigorous standard than that imposed by 28 U.S.C. Section 144. In sum, the court finds that the ruling on Plaintiffs' motion for disqualification would have been the same regardless of whether section 144 had been applied rather than section 455; because Plaintiffs have submitted no evidence of personal bias on the part of the undersigned, recusal is not warranted under either section.

For the foregoing reasons, Plaintiffs' motion for reconsideration [52-1] is DENIED.

SO ORDERED this 14th day of December 1999.

"s/ J. Owen Forrester" .
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13569-CC

WILLIAM H. JOHNSON,
LINDA L. JOHNSON,
Plaintiffs-Appellants,

Versus

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,
Defendant-Appellees.

---

On Appeal from the United States District Court
For the Northern District of Georgia

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, ___F.2d___).

Before : TJOFLAT, EDMONDSON, and HULL,
Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
"s/ Gerald Brad Tjoflat" .

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 99-13569-CC

WILLIAM H. JOHNSON,
LINDA L. JOHNSON,

Plaintiffs-Appellants,

Verses

Filed
UNITED STATES OF AMERICA, Jul. 7, 2000
INTERNAL REVENUE SERVICE,

Defendants-Appellees.

---

On Appeal from the United States District Court
For the Northern District of Georgia

---

ORDER:

(✓ The motion of Appellants, William & Linda Johnson, for () stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellants, William & Linda Johnson, for (x) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is granted to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of the order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of Appellants, William & Linda Johnson, for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of Appellants, William & Linda Johnson, for a further stay of the issuance of the mandate is DENIED.

"s/ Gerald Brad Tjoflat" .

UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 99-13569
Non-Argument Calendar

---

District Court Docket No. 96-01757-CV-JOF-1

WILLIAM H.JOHNSON,
LINDA L. JOHNSON,

Plaintiffs-Appellants,

Versus

Filed
Apr. 24, 2000

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,

Defendants-Appellees.

---

Appeal from the United States District Court
For the Northern District of Georgia

---

Before TJOFLAT, EDMONDSON and HULL,
Circuit Judges

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT the plaintiffs-appellants pay to the defendants-appellees, the costs on appeal to be taxed in accordance with Fed.R.App.P. 39.

Entered: April 24, 2000
For the Court: Thomas K. Kahn, Clerk
By: "s/ Matt Davidson" .
Deputy Clerk

ISSUED AS MANDATE: July 18, 2000

Appeals Transmittal and Case Memo
Date: Apr. 5, 1993
Routing To: [x] Exam. Supp. & Proc.
Copy To: [x] Examination
From: Appeals Code: 110
AP: A: PEH: pb Tel: (404) 331-0798
Special Features: [x] Offer in Compromise
Return To District

Taxpayer
JOHNSON, WILLIAM H. & LINDA L.

| TIN | Work Unit No. |
|---|---|
| 207-30-1327 | 10921225221 |

Tax Years
*8112, 8212 & 8312

Type of Case
[x] Income [x] OIC
Prior Findings: Tax Penalty
$64,338 $-0-
Disposal Information [x] Jurisdiction Rel.
Other Information

| Conf. | Examiner |
|---|---|
| 1 | C. Butler |

Remarks

APPEALS SETTLEMENT MEMORANDUM
ATTACHED

Date Apr 5, 1993

| Appeals Officer | | Earliest Statute Date |
|---|---|---|
| "s/ Patricia E. Hoyt" | 3/24/93 | 12/4/93 |

Approved [x] Assoc. Chief
"s/ Ronald G. Miller" 3-25-93

TAXPAYER: William H. and Linda L. Johnson

TAX YEARS: 1981, 1982 and 1983

I. Issue

Whether the District Director's proposed rejection of the taxpayers' Offer in Compromise based on doubt as to liability should be sustained.

II. Proposal of Settlement

The taxpayers are not willing to make any concessions to resolve this case. It is my opinion that there are hazards to the government in litigating the issue of the tax liability and litigation is possible if the taxpayers pay the tax and file a claim for refund. However, the hazards can be cured by reissuing the statutory notices of deficiency. Therefore, I recommend that the case be returned to the Atlanta District Office for further development and consideration as to whether new notices will be issued.

III. Findings of Fact, Law and Argument

The taxpayers are seeking to compromise, under section 7122 of the Internal Revenue Code, their unpaid Federal income tax liabilities, plus statutory additions for the calendar years 1981, 1982 and 1983.

The amount of the offer is the total sum of $10.00 paid in full, with waiver of refunds, default agreement and other provisions on Form 656. The District Office rejection memorandum indicates that the amount of the outstanding liability totals $64,337.49.

The offer, based on the doubt as to liability, as filed by Mr. And Mrs. Johnson contends that they are not liable for the taxes, penalties and interest asserted against them because, as they contend, "the taxes were illegally assessed." The offer also states: "The Johnsons have been unable to find any evidence of Notice of Deficiency having been sent to the Johnsons as required by law ..." Notices of Deficiency were issued to the taxpayers on September 3, 1987 by the Philadelphia District, but the taxpayers never received the notices and argue that they were not issued to the last known address.

At the time that the Philadelphia District initiated action to secure delinquent tax returns from the taxpayers, they resided at 118 East Locust Street, Ephrata, Pennsylvania 17522. They had filed a joint protest-type tax return for 1981 with the Philadelphia Service Center which reflected the Locust Street address. The Service Center advised the taxpayers on June 22, 1982 that the return would not be accepted as a valid tax return. The statutory notice of deficiency letters were ultimately issued for 1981, 1982 and 1983 to the 118 East Locust Street, Ephrata, Pennsylvania address.

The taxpayers did not file tax returns in response to requests from the Philadelphia Examination Division. Financial records were not provided. The Revenue Agent, Carl Butler, issued a summons to the taxpayers' bank for records for the examination. The taxpayers unsuccessfully attempted to quash the summons. The Agent closed the examination of the 1981-1983 tax years on or around May 20, 1986. The examination of the taxpayers' 1984-1986 years was continued by the Agent after he closed the 1981-1983 years.

On July 15, 1986, (after the 1981-1983 years were closed from the group), the Agent received a letter from the taxpayer advising of a change of address to 345 Valleybrook Drive, Lancaster, Pennsylvania 17601. This was the only notice provided to the Service by the taxpayers as to a change of address.

During the course of the examination of the subsequent years, the Agent mailed letters to the taxpayers dated April 30, 1987 to the new Valleybrook Drive address. (Before the notices were mailed by the District Office.) The letters to the taxpayer and his wife were returned undelivered.

During the examination, the Agent made numerous queriers to the Post Office for information concerning the taxpayer's new address. The taxpayers maintained Post Office boxes in their name and also in various business names used by Mr. Johnson. The boxes were changed a number of times.

On May 13, 1986, just prior to the 1981-1983 years being closed from the group, the Agent received information from the Post Office that the taxpayers' new address was P.O. Box 7868, Lancaster, Pennsylvania, 17605-7868. On May 18, 1987, (after the 1981-1983 years were closed from the group but before the notices were issued) the Post Office advised the Agent in the field who was still working subsequent years that the taxpayers' address had changed to P.O. Box 8353, Lancaster, Pennsylvania, 17604. It appears that this Post Office box was probably the only address in use at the time that the notices were mailed. In the Appeals conference, the taxpayers indicated that at the time the notices were mailed, they had left Pennsylvania and were staying with friends in Florida. They did not return to reside in

Pennsylvania, but later moved to Georgia.

The Philadelphia Collection Division apparently worked a case on the taxpayers. The case file has copies of requests for addresses to the Lancaster, Pennsylvania Post Office by Revenue Officer Dennis White. After a letter to P.O. Box 7868 was returned undelivered to Revenue Officer White on May 20, 1988, (after the notices were issued), the Post Office advised White that P.O. Box 7868 had been closed by the taxpayers on March 30, 1987 with the mail to be forwarded to the new address, P.O. Box 8353, Lancaster, Pennsylvania. Box 8353 was closed on November 2, 1987 (after the notices were issued) with no forwarding address provided. According to the Post Office, both of these boxes were "also rented under name of I.C.R. Corp."

The above information provided to the Revenue Agent (before the notices were issued) and the Revenue Officer (after the notices were issued) relating to the taxpayers' Post Office box numbers is consistent. The taxpayers point to this evidence in arguing that the Service did not issue the notices to the last known address. In the Appeals conference, the taxpayers actually argued alternatively that their mailing address at the time the notices were issued was the 345 Valleybrook address. When I pointed out that the Service had received mail returned undelivered to this address before the notices were issued, the taxpayers simply argued that the Service was in error because the notices were only mailed to an old address which the Service knew was no longer the correct address.

The taxpayers have filed numerous FOIA requests with the Philadelphia and Atlanta Districts as well as appealing to the Problems Resolutions Office in each

District. Many of the documents in the case file were provided to the taxpayers in response to various requests. The taxpayers have received information from the 1981-1983 case files as well as from the examination files for the 1984-1986 years. It is not possible now to determine the origin of much of the information in the current case file. (Note that page numbers are not consecutive, etc.)

The hazards in this case arise from the fact that the Service had knowledge of a more recent Post Office box number for the taxpayers at the time the notices were issued. This information was secured by the Agent in the field from the Post Office, not from the taxpayers. The information was not forwarded to the District Office for use at the time the notices were mailed. In fact, once the Agent closed the case from the field, he would have had no knowledge of the status of the years previously closed.

In this case, it is interesting to note that the taxpayers retained a certified public accountant who prepared returns for 1981-1983. The returns were submitted to the taxpayers on October 30, 1984 with a letter from the CPA advising the taxpayers to mail the returns to the IRS and that they owed a balance due of $2,636 for 1981. A refund purportedly was due for 1982 and 1983. Rather than filing the returns, the taxpayers advised the Revenue Agent by letter that they had determined that they did not owe any Federal income tax for 1981-1983 and that they had a right to a full refund of all income tax withheld.

In the Appeals conference, I asked the taxpayers why they did not file the returns prepared by their CPA. They indicated that they did not file because of the way the Revenue Agent had treated their CPA and

Attorney. It does not appear that the taxpayers ever met with the Revenue Agent. Correspondence in the case file clearly indicates that the taxpayers' CPA and attorney both were encouraging the taxpayers to voluntarily file their tax returns. However, this was not done.

Internal Revenue Code section 6212 provides that a notice of deficiency "shall be sufficient" if mailed to the taxpayer at his last known address. Section 6212 does not require that the taxpayer actually receive the notice of deficiency. *Keado v, Commissioner,* 88-2 USTC 9489 (5th Cir. 1988). The taxpayer's last known address is the address appearing on the taxpayer's most recently filed return, unless the IRS is given clear and concise notification of a different address. *Barbara Abeles v. Commissioner,* 91 TC 1019 (1988). If the government is notified of a change of address, then reasonable care and diligence must be exercised in ascertaining and mailing the notice of deficiency to the correct address. *Keeton v. Commissioner,* 74 TC 377 (1980).

In the instant case, the notices of deficiency were issued to the address appearing on the 1981 protest tax return that was mailed to the Service but not accepted as a return. Even when the notices were returned undelivered, the second notices were mailed to the same address. I confirmed with the Philadelphia 90-day letter unit that no notices were issued to other addresses. There is no evidence that any research was conducted to determine a more current address. The taxpayers had notified the Service of a new address before the notices were issued, but there is evidence that mail sent by the Service to the new address was returned undelivered before the notices were issued. The problem was compounded by the fact that

information on other addresses was secured by Service personnel in the field whereas the notices were issued by the District headquarters office who was not in contact with Revenue Agent or Revenue Officer.

I requested advice from District Counsel regarding the sufficiency of the deficiency notices previously mailed to the taxpayers. They concluded that the notices were of questionable validity and "therefore, it would be best not to rely on the original statutory notices of deficiency," They also agree with me that new deficiency notices can be mailed to the taxpayers. (See copy of District Counsel's response in case file.)

After the case was assigned to the Appeals Office, it was discovered that the taxpayers subsequently did file tax returns for 1981-1983. I requested the 1981-1983 returns in order to secure the Philadelphia District examination files for those years. In response to my request, I received various documents, but have not received the examination files. However, the files that I received included original joint Federal income tax returns submitted by Mr. and Mrs. Johnson to the Atlanta District Office (Group 4700) on December 4, 1990. This was the first indication that I had that such returns had been filed. Of course, they were submitted by the taxpayers after the separate statutory notice letters had been issued and defaulted for 1981-1983. The tax returns were treated as claims. The Atlanta Service Center issued certified notices of claim disallowance letters on June 3, 1991 for 1982 and 1983 and on June 5, 1991 for the 1981 tax year.

If the returns rejected by the Atlanta Service Center are considered filed by the taxpayers, then the three-year statute of limitations would be open until December 4, 1993. (Three years from the date received

by the Service.)

A protest tax return filed by a taxpayer is not considered a tax return and the statute of limitations does not start running. *W. H. Edwards*, 82-2 USTC 9472 (CA-9, 1982). Therefore, no statute started running on the 1981 year as a result of the filing of the protest tax return. If no return is filed, then no statute ever starts running. *Wallace Kraus v. U.S.*, 85-1 USTC 9310 (D.C., East Dist. N.Y., 1985). The IRS can issue multiple notices as long as the taxpayer has not petitioned the Tax Court and the statute is still open. *Lewis E. Smoot v. Commissioner*, 25 BTA 1038 (1932).

Atlanta District Counsel agrees with me that there is nothing in the instant case to prevent the issuance of deficiency notices at the present time. They conclude that "a second deficiency notice can be issued covering the same taxable periods due to the fact that no petition has been filed with the Tax Court and the statute of limitations has not lapsed." The only problem that I see is that the Philadelphia District examination files cannot be located.

The taxpayer filed a Form-911 and initiated a PRO case in Atlanta. The PRO case was worked by Atlanta Revenue Agent Brian Word. The case apparently was worked as an informal claim for refund. No abatement was recommended and the examination was concluded in January, 1992. Mr. Word recalls that he had the Philadelphia District examination workpapers when he worked the informal claim PRO case. His files, including the examination workpapers, were closed to the Atlanta Exam Division Problems Resolution Section. The subject Offer in Compromise was rejected by the Atlanta Examination Division

based strictly on the examination conducted by Agent Word. PRO secured the files that I have received; however, they DO NOT include the exam workpapers. Silas James has personally worked to secure the Philadelphia examination workpapers, but to no avail.

IV. Conclusion

The taxpayers' Offer in Compromise is based on doubt as to liability because the validity of the deficiency notices may be questionable. Since the Service can still issue deficiency notices on the same years, I cannot accept or reject the taxpayers' offer at this time. Therefore, I recommend that this case be returned to the Atlanta District Examination Division for reissuance of the notices if the notices if the exam workpapers can be found. If they cannot be found, then I suggest that the Examination Division's proposed rejection of the taxpayers' Offer in Compromise be reconsidered. Without the workpapers, there is no evidence with which to go forward in court to establish the basis of the figures used in the deficiency notices for the taxpayers' income. It is my opinion that the Appeals Office could not sustain the proposed rejection without the workpapers. In any event the taxpayer's correct tax figures would not be less than the amounts of tax shown on the "returns" filed by the taxpayers on December 4, 1990.

For the reasons explained above, it is also my opinion that any new deficiency notices should be issued before December 4, 1993. Therefore, that statute date should be controlled for examination purposes rather than the later collection statute date.

**Investigation History:**

Hand written notes of Revenue Officer Janet Grimes

Dated: 3-23-93, Rec'd TC from Patricia Hoyt, stated have status of OIC, she is returning case to Examination Division to be reworked. Tax amount is incorrect, in addition to examination issuance of Statutory Notice to wrong address when had a correct address for Tp, Tp never received notice. Case work papers have not been located to date, therefore tax will need adjusting by Examination Division. She recommend do not pursue collection at this point since tax assessment is not correct, she will send copy of settlement papers outlining her decision by 3-25-93

**Reviewers Report** Control no. 207-30-1327
To: (Group Manager) Referred to:
Darryl Gilliam B. Word 06-23-93
Number of returns: (3)
TYPE OF REPORT: [X] Other
Statute expires in six months: 12-04-93
Name of Taxpayer: Reason for review:
William H. & Linda L. [x] Mandatory
Johnson Offer in Compromise

Comments
(use Form 885-A Snap-out for continuation sheet is necessary)

This case was returned to the Atlanta District by the Appeals Office for further consideration of the offer in compromise. The offer in compromise is predicated on doubt as to liability alleging deficiency notices for the years in question (1981, 1982 and 1983) were not mailed to taxpayers' last known address. Appeals and District Counsel both concluded, that the deficiency

notices previously issued to the taxpayers are of questionable validity. Therefore, they agree that it would be best not to rely on the original notices. However, they have suggested that the Atlanta District reissue the deficiency notices, if the examination workpapers can be located.

This case involves deficiency notices that were issued in another district, numerous FOIA requests, a PRO case and an offer in compromise as well as District Counsel and Appeals involvement. Nevertheless, due to the involvement of so many different departments within the Internal Revenue Service, this case has turned into an administrative nightmare. At present, the missing original workpapers have put the Service in a precarious position, and the taxpayers are unwilling to make any concessions to resolve the case. Therefore, certain steps must be taken to protect the government's interest and bring this case to a close.

First, efforts should be made to locate the missing workpapers, contact should be made with those persons who were involved with this case. These contacts should include but not be limited to Appeals Officer P. Hoyt.

Since, the workpapers were available at the time the case was worked as a PRO case, the Form 3210 that released the workpapers from that group should be reviewed, along with any subsequent Forms 3210. The trail of these forms may lead you to the present location of the workpapers. If the workpapers can be located the District may proceed with the reissuance of the deficiency notices.

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| Reviewer | Date | Approved (Chief Quality Review) |
|---|---|---|
| M.B.Jones /s/MBJ | 6/28/93 | /s/Betty Dawson |

| Examiner | Additional | Date |
|---|---|---|
| /s/Brian A. Word | 28 | 9-21-93 |
| Group Manager | | Date |
| /s/Daryl Gilliam | | 9/27/93 |

EXPLANATION OF ITEMS

| Name of Taxpayer | Year/Period Ended 8112 |
|---|---|
| William H. & Linda L. Johnson | 8212, and 8312 |

However, if the workpapers cannot be located it may be necessary to abate those assessments that were based on the deficiency notices issued by the Philadelphia District. If abatement procedures are executed, I suggest that the returns filed by the taxpayers on December 4, 1990, be processed as delinquent returns. However, the returns should be compared with the write-up for the years in question and inquiry should be made regarding any differences. The returns as filed by the taxpayers reflect an amount due for the 1981 year and refunds for the 1982 and 1983 years. However, due to the statute of limitations the taxpayers are not entitled to receive any refunds for these years. It is important to note that if the returns rejected by the Atlanta Service Center are considered to be filed returns, the statute of limitations will expire on December 4, 1993. Therefore, it is in the best interest of the Service to take all necessary action and properly document the file before December 4, 1993, as to avoid yet another questionable issue.

Please forward the case to Quality Measurement Staff attention M.Jones upon closure.

## RESPONSE TO REVIEWER'S REPORT

Per discussion with GM on how best to proceed with this case, it was decided that RA would meet with TP in order to examine TP informal claim whereby TP would provide records to verify informal claims. The workpapers in the file document the results of the meeting with the TP as well as subsequent discussions with GM and QMS.

In summary, TP refused to cooperate in providing records and provided a signed statement that they wish to decline any reconsideration of their tax liabilities for 1981, 1982 and 1983.

Because TP had previously filed returns for 1981, 1982 and 1983 with IRS thru Collection Division, the claims are being processed as follows:

TP will be given joint status by abating assessments on Mrs. TP account for all three years as they were treated as MFS.

Since the TP has refused to provide verification for returns (claims), income is being accepted as stated and expenses are being reduced to reflect nominal amounts. No capital losses are being allowed.

This casefile is being resolved based on the above.
L693 is completed and is attached to be sent to the TP pending your receipt and review of the casefile.

/s/ Brian A. Word
Brian A. Word
Revenue Agent, Group 1327
488-9455

ADDENDUM TO 4318

Upon having meeting with the TP, RA determined the informal claim would be disallowed in full. RA called Monica Jones in QMS and advised of the results of the meeting. It was determined that due to the fact that the records, which supported the original assessment, were unlocatable it would be in the best interests of the government to allow the TP informal claim anyway because without the records, Appeals would not support the assessments, nor would District Counsel support the assessments. It was felt that the TP, due to the history of the case, would pursue the matter to the highest level possible, which includes court litigation. Since we cannot locate the records then it is best to concede the prior assessments.

It was decided to allow, on Schedule C, 15% of gross receipts as ordinary and necessary business expenses and not the amount TP claimed since the TP refused to cooperate. All other issues such as basis on assets sold, etc. were conceded since we have no way of proving otherwise.

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Handwritten Note:
(Handwriting appears to that of Monica B. Jones)

William & Linda Johnson 11/3/93

Re: Search for original records

Form 2275 submitted through PRO 11/2/93

R/A Word did no further search for records upon receipt of the case file via 3990. He was advised by his G.M. that this would be pointless and that he should

pursue working the informal claim.

Appeals Transmittal dated 4/5/93 from P. Hoyt p.6. Hoyt mentions that Silas James of the Exam PRO Office worked personally to secure the Exam workpapers but to no avail.

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INTERNAL REVENUE SERVICE

MEMORANDUM

DATE: November 17, 1993

TO: Betty Dawson, Section Chief, QMS
Atlanta District

From: Monica B. Jones, Reviewer, QMS
Atlanta District /s/ MB Jones

---

SUBJECT: William and Linda Johnson –
SSN: 207-30-1327

Pursuant to our conversation on November 2, 1993, regarding the Offer in Compromise case of William and Linda Johnson I executed Forms 2275 (Records Request) for all years in question (8112, 8212, and 8312) via Examination Division's Problem and Resolution Office. The search for the records resulted in the finding of the attached workpapers, but no records. The researcher noted on the Forms 2275 that the records were charged out to Silas James. I have followed-up with Mr. James and these records are no

longer in his possession.

At present, a decision must be made as to what should be the final disposition of this case. This decision should preferably be made before December 4, 1993, as this is a questionable statute date. Copies of the Appeals Transmittal, District Counsel Opinion, Form 3990, and the R/A's response to 3990 are attached for your review.

Please inform me of your concurrence with the proposed closure of this case or advise me of other procedures that should be executed to bring this case to a final conclusion.

(Handwritten notes at bottom of page)

Manager held a meeting on 11/23/93 with Monica & Nancy R. (Stat Notice Coord). We discussed possible approaches to dispose of the case. After considering the Pro's & con's of each approach, manager advised the reviewer (Monica) to issue a 2nd Notice of Deficiency (with figures different from the original notice). It will take into consideration findings/outcome of RA, B. Word's meeting with the TP and audit recommendations. It will also be consistent with lack of substantiation cases in preparation of the Stat Notice. We must ensure that the notice is sent to the correct address. Submit no later than 11/30/93. This approach is consistent with Counsel's advice.

/s/ Betty Dawson

Sec Chief, QMS

Internal Revenue Service
Department of the Treasury
401 W. Peachtree Street, N.W., Atlanta, GA 30365
District
Director

Person to Contact:
J. Stubbs
Telephone No.:
(404) 331-6033
Refer Reply to:
F 58200770
Date:
May 6, 1992

Mr. William H. & Linda L. Johnson
5158-T East Ponce de Leon Avenue
Stone Mountain, Georgia 30083

Dear Mr. & Mrs. Johnson:

Thank you for allowing us additional time in which to respond to your Freedom of Information Act (FOIA) request.

Enclosed are copies of the 1981, 1982 and 1983 tax returns for William, SSN: 207-30-1327. Nothing has been excised or withheld.

At the present time, we have been unable to locate any separate returns for Linda, SSN: 185-34-1998. If you have any additional information which would assist us in locating other returns , please let us know.

If you have any questions or I can be of further assistance, please let me know.

Sincerely Yours
/s/ Jean S. Pate
Jean S. Pate, Disclosure Officer Enclosures: As stated

(Handwritten notes of William H. Johnson
at bottom of previous page)

Received May 9, 1992

May 11, 1992 8:24 AM, Phoned and talked with J. Stubbs about Exam Files which have not been received by us. I made her aware that I had seen additional files at Jan. 28, 1992 meeting with Brian Word.

**She told me that we would receive examination files only by mistake !?**

---

IPR Substitute for Returns (SFR) Program
IR Manual 3(15)(185)0

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3(15)(185)(12)
Statutory Notices

3(15)(185)(12).1
Notice Issuance Criteria

(1) Statutory Notice of Deficiency procedures will be employed when:

(a) a response to Letter 1862(C) is not received within 45(60) days (75 days for APO/FOP addresses and those addresses outside the U.S.);

(b) an undelivered response that cannot be reissued to a new address after using procedures in 3(15)(185)(10).2;

(c) a remailed (undelivered that obtains a new address) Letter 1862(C) package which is not responded to

within 45(60) days (75 days for APO/FOP addresses and those addresses outside the U.S.);

(d) a remailed (undelivered) Letter 1862 (C) package is returned as being undeliverable to a new address and all addresses found have been tried;

(e) other correspondence issued in an attempt to resolve missing data, etc., according to instructions in 3(15)(185)(10) is not responded to within 45 days (60 days for APO/FOP addresses and those outside the U.S.).

(2) Statutory Notices of Deficiency will only be issued when the

**(complete line redacted from text)**

according to instructions above.

3(15)(185)(13).4
Undelivered Statutory Notices

(1) When a Statutory Notice of Deficiency is returned by the Post Office as undeliverable, first check IDRS to see if a change of address has occurred due to the posting of a subsequent year's tax return or other activity.

(2) If a new address is found, prepare a new Statutory Notice of Deficiency, using the new address following the instructions in 3(15)(185)(12).2 and 3(15)(185)(12).3 above.

(a) When re-mailing a statutory notice to a new address , the address used must be noted in the case file.

(b) Place the original undelivered statutory notice in the case file.

(3) If a new address is found by (1) above, check the case file to see if any other address (which has not been used already) exists. Follow undeliverable

instructions in 3(15)(185)(10).2 above whenever possible (i.e., the letter 1862(C) was not responded to nor returned undeliverable).

(a) If a new address is found, prepare a new statutory notice. Follow 3(15((185)(12).2 and 3(15)(185)(12).3 instructions.

(b) If a new address is not found, the assessment will be made after the Statutory Notice of Deficiency suspense period has expired.

(4) Whenever a new notice is issued, make sure to update the IDRS control base, Also note the case file.

---

Internal Revenue Service
Department of the Treasury
401 W. Peachtree Street, N.W., Atlanta GA, 30365
District
Director

Person to Contact:
M. McGovern
Telephone No:
(404) 331-6033
Refer Reply to:
F-0636
Date:
January 21, 1998

Mr. and Mrs. William H. Johnson
5158 East Ponce de Leon Ave.
Apt. T
Stone Mountain, GA 30083

Dear Mr. and Mrs. Johnson:

This is in response to your letter dated January 17, 1998, in which you requested data under the provisions of the Freedom of Information Act (FOIA).

With your letter you enclosed a transcript of your 1981 tax account which was printed on January 10, 1996. You asked us to provide you with information concerning an entry identified as **PROJ:021 PTR-DO:00.**

Based on our research please find enclosed an excerpt from Document 6209, ADP and IDRS INFORMATION, 1994-declassified. Project 021 is a PUSH CODE which indicates a SUBSTITUTE FOR RETURN CASE. The remaining portion does not apply to you ... it applies only to partners and partnerships.

As you know, we are not required to perform research under the provisions of the FOIA. You can, however, request a copy of Document 6209 under the act. It is available to you for $64.95. If you are interested, please send us your written request along with your check or money order made payable to the Internal Revenue Service.

Please let us know if we can offer further assistance.

Sincerely yours,
/s/ Jean S. Pate
Jean S. Pate
Disclosure Officer

Enclosure:
As stated

DISCUSSION

The United States will address each of the requests as plaintiffs have presented them in their Motion to Compel, and will set out plaintiffs' request and the Government's response.

**REQUEST DATED JANUARY 20, 1999:**

Request: All documents and material relevant to Internal Revenue Service project 21 which is identified on attached copy of computer printout, marked for identification (M-1).

Response: The United States objects to this request to the extent the request seeks documents with respect to taxpayers other than the plaintiffs. The United States will produce the requested documents, other than documents to which the objection applies, at a time and place to be determined by mutual agreement between the parties.

Discussion: Plaintiffs allege in their Motion to Compel that "On April 14, 1998, Defendant's Counsel, Ann Reid, informed Plaintiffs that the United States will not produce relevant documents to this request." Actually, the undersigned counsel informed plaintiff William Johnson that no such documents exist. There are no documents to be produced.

**REQUEST DATED MARCH 4, 1998:**

Request 1. Copy of joint appointment letter referenced in "History" dated 5-7-86, circled and highlighted for identification, document marked for identification, K-238, attachment 1-2.

Response: The United States objects to this request on the ground that the documents requested are not relevant to this case nor are they reasonably calculated to lead to admissible evidence.

Discussion: Plaintiff is requesting a copy of a document from a revenue agent in

**PUBLISHER'S NOTE :**

**ORIGINAL PAGINATION IS NOT CONTINUOUS.**

Supreme Court, U.S.
FILED
00-847 OCT 2 - 2000
OFFICE OF THE CLERK

No.

IN THE

# Supreme Court of the United States

WILLIAM H.JOHNSON, and
LINDA L.JOHNSON,
*Petitioners,*

v.

UNITED STATES OF AMERICA
*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI
Separate Appendix

William H. and Linda L.Johnson
5158 East Ponce de Leon Ave.
Apartment T
Stone Mountain , Georgia 30083
Telephone: 404/299-7430

75pp

**CONSTITUTION**
**OF THE**
**UNITED STATES OF AMERICA**
**AMENDMENT 5**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of Was or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; **nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation. (emphasis added)

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**5 U.S.C. Section 301. Departmental regulations**

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding from the public or limiting the availability of records to the public.

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**5 U.S.C. Section 552 (A) (4) (B)**

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated. or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

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**18 U.S.C. Section 241. Conspiracy against rights**

If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same: or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured - -

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both: and if death results, they shall be subject to imprisonment for any term of years or for life.

**18 U.S.C. Section 2071. Concealment, removal, or mutilation generally**

.(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

.(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.

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**26 U.S.C. Section 6212 Notice of deficiency.**

.**(a) In general.** If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43 or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

.**(b) (2) Joint income tax return.** In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single notice, except that if the Secretary has been notified by either spouse

that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address.

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**26 U.S.C. Section 6213. Restrictions applicable to deficiencies; petition to Tax Court.**

.**(a) Time for filing petition and restriction on assessment.** In part, within 90 days after the notice of deficiency authorized in section 6212 is mailed, the taxpayer may file a petition with the Tax Court for redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day period, nor if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.

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**26 U.S.C. Section 6501. Limitations on assessment and collection.**

.**(a) General rule-** Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed, etc.

**26 U.S.C. Section 7422 Civil actions for refund.**

.**(a) No suit prior to filing claim for refund.** No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been filed with the Secretary, according to the provisions of law in regard, and the regulations of the Secretary established in pursuance thereof.

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**26 U.S.C. Section 7433 Civil damages for certain unauthorized collection actions.**

.**(a) In general.** If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

.**(d) Limitations. (1) Requirement that administrative remedies be exhausted.** A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

.**(2) Mitigation of damages.** The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonable been mitigated by the plaintiff.

.**(3) Period for bringing action.** Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and brought only within 2 years after the date the right of action accrues.

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**Title 28**
**Judicial Administration**

**Chapter I – DEPARTMENT OF JUSTICE**
**Part 50 – STATEMENTS OF Policy**
Order No. 530-73
**Policies With Regard to the Defense of Civil Actions Under the Freedom Of Information Act and the Functions of the Freedom of Information Committee**

Under and by virtue of the authority vested in me by section 509 of Title 28 of the United States Code, Part 50 of Title 28 of the Code of Federal Regulations is amended by adding at the end thereof the following new section:

**Section 50.9** Policies with regard to the defense of civil actions under the Freedom of Information Act and the functions of the Freedom of Information Committee.

.(a) No civil action against a federal agency under the Freedom of Information Act, 5 U.S.C. 552, shall be defended by the Civil Division, the Tax Division or any other part of the Department of Justice unless the Department's Freedom of Information Committee has been consulted by the agency, This does not preclude the defense of a premature suit, brought before the agency's final denial of the materials at issue, provided that the agency as promptly as possible upon the filing of the suit brings the matter before the Committee.

.(b) The Freedom of information Committee referred to in this section is the committee of lawyers in the Office of Legal Counsel and in the Civil Division which was first established December 8, 1969. The functions and current membership of the Committee are noted in a memorandum from the Attorney General to the heads of all agencies issued at the time of the adoption of this section.

.(c) The Committee is instructed to make every possible effort to advance the objective of the fullest responsible disclosure. to this end, in connection with its consultations with agencies that propose to issue final denials under the Act, the committee shall , in addition to advising the agency with respect to the legal issues, invite the attention of the agency to the range of public policies reflected in the Act, including the central policy of the fullest responsible disclosure. The Committee may also request assistance and make studies and recommendations to carry out the intent of this paragraph.

Dated: July 11, 1973.

Elliot L. Richardson,
*Attorney General.*

[FR Doc.73-14649 Filed 7-17-73; 8:45 am]

**28 U.S.C. Section 144. Bias or prejudice of judge**

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

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**28 U.S.C. Section 455. Disqualification of justice, judge, or magistrate**

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably be questioned.

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**28 U.S.C. Section 1346. United states as defendant**

.(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

.(1) Any civil action against the United States for the recovery of any internal- revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

---

**26 C.F.R. Section 301.7433-1 Civil cause of action for certain unauthorized collection actions.**

.**(g) Period of limitations – (1) Time for filing.** A civil action under paragraph (a) of this section must be brought in federal district court within 2 years after the date the cause of action accrues.

.**(2) Right of action accrues.** A cause of action under paragraph (a) of this section accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.

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**26 C.F.R. Section 601.105 THIRTY – day letters –**

In an unagreed case, the district director sends to the taxpayer a preliminary or "30-day letter" if any one of the last three determinations is made (except full allowance of a claim in respect of any tax). The 30-day letter is a form letter which states the determination proposed to be made. It is accompanied by a copy of the examiner's report explaining the basis of the Of the proposed determination.

taxpayer that if the taxpayer concurs in the recommendation, he or she indicate agreement by executing and returning a waiver or acceptance. The preliminary letter also informs the taxpayer of appeal rights available if he or she disagrees with the proposed determination. If the taxpayer does not respond to the letter within 30 days, a statutory notice of deficiency will be issued or other appropriate action taken, such as the issuance of a notice of adjustment, the denial of a claim in income, profits, estate, and gift tax cases, or an appropriate adjustment of the tax liability or denial of a claim in excise and employment tax cases.

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**26 C.F.R. Section 601.106. Appeals functions.**

.(f)(1) Rule I. An exaction by the U.S. Government, which is not based upon law, statutory or otherwise, is a taking of property without **due process of law,** in violation of the Fifth Amendment to the U.S. Constitution. Accordingly, an Appeals representative in his or her conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction. It shall be his or her duty to determine the correct amount of the tax, with strict impartiality as between the taxpayer and the Government, and without favoritism or discrimination as between taxpayers.

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**26 C.F.R. Section 601.702**

**.(b)(1)** The IRS is required under 5 U.S.C. Section 552(a)(2) to make available for public inspection and copying

**.(iii)** its administrative staff manuals that affect a member of the public.

**.(b)(3)** Public reading rooms

Each regional office of the IRS will provide a reading room or reading area where the matters described in paragraph (b)(1)(I) through (iii) of this section which are required by such paragraph to be made available for public inspection will be made available to the public for inspection and copying.

**.(b)(3)(iv)** Copies of the requested material may also be mailed to such person by such office upon request. If requested reading room material is not readily available for inspection at the office where the request is made, then the request will be referred by such office to one of the reading rooms of the IRS.

**.(c)(1)** The IRS will make reasonable described records available to a person making a request for records which conforms in every respect with the rules and procedures set forth in this subpart. This paragraph applies only to records in being which are in the possession or control of the IRS.

**.(c)(2)(I)** The request for such record will immediately be transferred to the appropriate constituent unit and the requester notified to that effect. Where the request is for a record which is determined not to be in the possession or control of any constituent unit of the Dept. of the Treasury, the requester will be advised and the request will be returned to the requester.

**.(c)(3)(ix)** However, every effort will be made to comply with the requests as written.

**26 C.F.R. Section 601.702 cont.**

**.(c)(4)(i)(A)** The requester shall be afforded an opportunity to refine his request. Such opportunity may, where desirable, involve a conference with knowledgeable IRS personnel.

**.(c)(4)(i)(A)** The reasonable description requirement will not be used by officers or employees of the IRS as a device for improper withholding records from the public.

**.(c)(4)(i)(B)** The IRS will make every reasonable effort to comply fully with all requests for access to records subject only to any applicable exemption.

**.(c)(7)(i)** The initial determination will be made and notification thereof mailed within 10 days after the date of receipt of the request.

**.(c)(7) Denial of request.**

**.(iii)** The person making the request will be notified by mail and advise the person making the request of the right to appeal to the Commissioner.

**.(c)(8) Administrative appeal.**

The Commissioner or his/her delegate will acknowledge receipt of the appeal and advise the requester of the date of receipt and when a response is due in accordance with this paragraph.

**.(c)(12) Preservation of records.**

Under no circumstances shall records be destroyed while they are the subject of a pending request, appeal or lawsuit under 5 U.S.C. Section 552. Re: Title 44 U.S.C.

**Section 1(15)59.26 Destruction of records.**

.**(a)** Income Tax Returns by Individuals
.**(b)** Description of records and disposition authorizations
.**(c)** These records include the Forms 1040 series, with related schedules, correspondence, audit reports, workpapers and other documents attached to the return or considered a part of the administrative file, regardless of whether the documents are physically with the return or maintained in an attachment file.
.**(d)(2)** Returns in penalty file. Returns on which a penalty of 50% or more has been assessed and cases for which Criminal Investigation Division has requested longer retention.
. **(e)(2)(a)** RETIRE to the federal Records Center July 1 through September 30 following the year in which returns were numbered in penalty or supplemental series.
.**(f)(2)(b)** DESTROY six years and nine months after the end of the calendar year in which case closed.

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**Section 3(15)(185)0**

IRP Substitute for Returns (SFR) Program, **103 pages**

**Section 3(15)(185)(12).1 Notice Issuance Criteria**

.**(1)** Statutory Notice of Deficiency procedures will be employed when:
.**(a)** a response to Letter 1862 (C) is not received within 45(60) days (75 days for APO/FOP addresses and those addresses outside the U.S.);

.**(b)** an undelivered response that cannot be reissued to a new address after using procedures in **3(15)(185)(10).2;**

.**(c)** a remailed (undelivered that obtains a new address) Letter 1862 (C) package which is not responded to within 45(60) days (75 days for APO/FPO addresses and those addresses outside the U.S.);

.**(d)** a remailed (undelivered) Letter 1862(C) package is returned as being undeliverable to a new address and all addresses found have been tried;

.(e) other correspondence issued in an attempt to resolve missing data, etc., according to instructions in **3(15)(185)(10)** is not responded to within 45 days (60 days for APO/FPO addresses and those outside the U.S.).

.**(2)** Statutory Notices of Deficiency will only be issued when the

**(entire line of print redacted)**

according to instructions above.

**3(15)(185)(13).4 Undelivered Statutory Notices**

.**(1)** When a Statutory Notice of Deficiency is returned by the Post Office as undeliverable, first check IDRS to see if a change of address has occurred due to the posting of a subsequent year's tax return or other activity.

.**(2)** If a new address is found, prepare a new Statutory Notice of Deficiency, using the new address following the instructions in **3(15)(185)(12).2** and **3(15)(185)(12).3** above.

.**(a)** When remailing a statutory notice to a new address, the address used must be noted in the case file.

.**(b)** Place the original undelivered statutory notice in the case file.

.**(3)** If a new address is not found by (1) above, check the case file to see if any other address (which has not been used already) exists. Follow undeliverable instructions in **3(15)(185)(10).2** above whenever possible (i.e., the Letter 1862(C) was not responded to nor returned undeliverable).

.**(a)** If a new address is found, prepare a new statutory notice. Follow **3(15)(185)(12).2** and **3(15)(185)(12).3** Instructions.

.**(b)** If a new address is found, the assessment will be made after the Statutory Notice of Deficiency suspense period has expired.

.**(4)** Whenever a new notice is issued, make sure to update the IDRS control base. Also note the case file.

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**Section 4243.2 Undeliverable Mail**

.**(1)** When Examination employees issue notices or letters concerning examinations to addresses that are no longer valid, no one benefits. The taxpayer is not being treated fairly, and in many cases the undeliverable mail may generate an uncollectible account or an audit reconsideration.

.**(2)** Each time correspondence is returned undeliverable a determination as to the taxpayer's correct address is to be made.

.**(3)** Research for the correct address will consider inhouse address information before requesting outside locator services. Documentation of the research is required and Form 8572 is available for this documentation.

.**(4)** Rev. Proc. 90-18 provides that the taxpayer's address for mailing a notice of deficiency is the last known address. Etc.

**Disclosure of Official Information Handbook**
**Page 1272-151**

**Section (13)34 Making Transfers**

.**(1)** Cases will be transferred to the office of proper jurisdiction whenever the request contains some indication that access to records located elsewhere is desired or when research suggests that records could be located in another office.
.**(2)** A Disclosure Officer's independent knowledge of IRS institutional practices may also indicate that, although no responsive records within his or her office, there are responsive records in another office. In such a case, the request will be transferred to that office.

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**ADP and IDRS Information 1987, Document 6209**

Document 6209 is provided as a handy reference guide only. More detailed and current information can be found in the appropriate Internal Revenue Manuals or ADP Handbooks. Limited resources and book format make on-going maintenance of this document prohibitive.

Providing Document 6209 in bound format is the most economical method for accommodating our needs. The initial cost of changing from bound book to loose-leaf would be prohibitive. Additionally, the costs incurred in subsequent years would also be greater than in bound format.

Document 6209 contains **material of a sensitive nature and therefore requires maximum safeguards.** (continued on next page)

**Document 6209, continued. ( 390 pages )**

In addition, security dictates that copies of the Document 6209 carried by Revenue Officers and others should not come apart easily as potential loss would compromise **" Official Use Only"** material.

*OCHOA v. HERNANDEZ,* (1913), 230 U.S. at 139: Even if the commanding officer in territory occupied by military forces of the United States has all legislative power as to such territory possessed by Congress, he is still subject, as Congress is, to the provisions of the Fifth Amendment and cannot by military orders deprive persons of their property without due process of law.

To shorten the period for acquisition of title by prescription and give the order a retroactive effect so that the period has elapsed at the time the order is made without giving those who have interests in the property an opportunity to be heard and saving no existing rights, amounts to taking property without due process of law.

*Ochoa,* at 161: Without the guaranty of "due process" the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that chapter (Coke, 2 Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term ""due process of law," all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.

*Garfield v. United States,* (1908) 211 U.S. 249, at 262: In the extended discussion which has been upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

The right to be heard before property is taken or

rights or privileges withdrawn, which have been previously legally awarded, is the essence of due process of law. It is unnecessary to recite the decisions in which this principal has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this Court.

*Brandt v. Hickel,* 427 F.2d 53 (1970( at 54: Due process clause requires that notice must be reasonably calculated to inform parties of administrative proceedings which may directly and adversely affect their legally protected interests.

*Mathews v. Eldridge,* 424 U.S. 319, at 333: This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principal basic to our society." The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." (citations omitted)

*Bolling v. Sharpe,* 347 U.S. 497 (1854): Though the Fifth Amendment does not contain an equal protection clause, as does the Fourteenth Amendment which applies only to the States, the concepts of equal protection and due process are not mutually exclusive. P. 499. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Although the Court has not assumed to define "liberty" with any great precision, that term is not

confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.

*Dent v. West Virginia*, 129 U.S. 114, at 120: "The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution save only by the law of the land."

From these authorities the conclusion is inevitable that the terms life, liberty and property, as used in the Constitution, were intended to comprehend **every right** known to the law, which might in any manner become the object of state oppression, and that a man's estate in his profession and the right to the enjoyment of his acquired reputation are as certainly included in the meaning of these terms as his lands and chattels.

*Dent*, at 121: It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecutation, is often of great value to the possessors, and cannot be arbitrarily taken from them , any more than their real or personal property can be thus taken.

*U.S. v. Price*, 383 U.S. 787, 800: The language of Section 241 is plain and unlimited. As we have

discussed, its language embraces **all** of the rights and privileges secured to citizens by **all** of the Constitution and **all** of the laws of the United States. *Price*, at 801: We think that the history leaves no doubt that, if we are to give Section 241 the scope that its origins dictate, we must accord it a sweep as broad as its language.

*U.S. v. McDermott*, 918 F.2d 319 at 325: As stated in *United States v. Guest*, 383 U.S. 745, decided on the same day as *Price*, "when Section 241 speaks of 'any right or privilege secured by the Constitution or laws of the United States,' it means precisely that." 383 U.S. at 753.

*Walker v. U.S.*,93 F.2d 383: The gist of the crime of conspiracy to injure citizens in the exercise of a right or privilege secured to them by Federal Constitution or laws is the unlawful conspiracy (Cr. Code, Section 19, 18 U.S.C.A. Section 51., *Walker*, at 385: In prosecution for conspiracy, much discretion is vested in trial court with reference to admissibility of evidence of circumstances, and ruling of trial court will ordinarily be sustained if testimony which is admitted tends in some degree to establish ultimate fact, or makes evidence intelligible (Cr. Code, Section 19, 18 U.S.C.A.. Section 51.

*U.S. v. Purvis*, 580 F.2d 853, at 854: Government must prove specific intent to deprive a citizen of constitutional rights to sustain a conviction under statute imposing criminal sanctions for conspiring against citizens. "Conspiracy" incorporates willfulness and specific intent, and intent to accomplish an object cannot be alleged more clearly than stating that parties conspired to accomplish it.

*Luteran v. U.S.*, 93 F.2d 395,: Where proof of a conspiracy has been established, a relatively slight amount of evidence connecting accused therein is sufficient to sustain conviction. Participation in

formation of conspiracy is not essential to culpability, if after it is formed, accused aid or abetted it with understanding of its purpose. Evidence of conspiracy must disclose something further than participation in offense which is object of conspiracy at some stage of its execution, for there must be proof of an unlawful agreement, either express or implied. Where accused aided conspirators, knowing, in a general way, their purpose to brake the law, jury may infer that accused entered into express or implied agreement with them.

*Wilkins v. U.S.*, 376 F.2d 552, at 553: In civil rights conspiracy indictment, not only must specific intent to interfere with federal right be alleged but it must be proven by evidence beyond reasonable doubt.

*U.S. v. Morado*, 454 F,2d 167: Statute prohibiting conspiracy against rights of citizens does not require that any overt act at all be shown.

*U.S. v. Robinson*, 503 F.2d 208: It is not necessary that all or more than one of the conspirators participate in a particular overt act of the conspiracy.

*U.S. v. Skillman*, 922 F.2d 1370: Once conspiracy is established, defendant must only have connection to link him with conspiracy; this slight connection may be demonstrated by proof of defendant's willful participation in illegal objective with intent to further some purpose of conspiracy.

*U.S. v. Ellis*, 595 F.2d 154, at 155: Proof of conspiracy may rest on indirect or circumstantial evidence; existence of conspiracy may be inferred from evidence of related facts and circumstance from which it appears, as a reasonable and logical inference, that the activities of the participants in the criminal venture could not have been carried on except as the result of a preconceived scheme or common understanding.; *Ellis* at 162: An act done in open defiance or reckless disregard of the Constitutional requirement which has been made specific and

definite, may be found to have been willfully within the meaning of the statute.

*U.S. v. Redwine,* 715 F.2d 315: Government need not establish that there existed formal agreement to conspire: circumstantial evidence and reasonable inferences drawn therefrom concerning the relationship of the parties, their overt acts, and totality of their conduct may serve as proof.

*U.S. v. Callahan,* 659 F.Supp. 80, at 84: Proof of violation of Section 241 requires a showing of an agreement with the specific intent to interfere with exercise of a federal right, and at least one overt act taken to accomplish the intent of the conspiracy. (citations omitted)

*U.S. v. Anderson,* 481 F.2d 685, at 697: An unlawful conspiracy is presumed to continue until its objective or purpose is achieved. (citations omitted)

*U.S. v. Guillette,* 547 F.2d 743, at 744: Defendant need not be a member of the conspiracy from its inception but may join later and incur liability for the conspiracy's unlawful act committed both before and after his adoption of the conspiracy.

*Cartello v. U.S.,* 93 F.2d 412, at 415: A conspiracy is the gist of the offense, and that conspiracy must be proven beyond a reasonable doubt, either by direct or circumstantial evidence, or both. "But in conspiracy cases, the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged. It is, therefore, primarily essential to establish the existence of a confederation or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained."

*Devoe v. U.S.,* 103 F.2d 584, at 585: In conspiracy prosecution, trial court had discretion to admit evidence which even remotely tended to establish the

conspiracy charged.

*U.S. v. Guzzino,* 810 F.2d 687, at 688: Verdict based on circumstantial evidence must not rest solely on piling of inference upon inference, but neither should reviewing court view each bit of evidence in isolation Common sense is no substitute for evidence, but common sense should be used by jury to evaluate what reasonable may be inferred from circumstantial evidence. *Guzzino,* at 696: Direct evidence, however, although it may be considered more reliable, is by no means the only evidence from which a jury may find the necessary knowledge and intent. It has long been established that " the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." The "substantial evidence" necessary to prove a criminal conspiracy need not be proved by direct evidence as the common conspiratorial purpose and plan may be inferred from "a development and a collection of the circumstances." It is indeed a "rare case" where there is direct evidence to show the requisite knowledge and intent of coconspirators. (citations omitted)

*Armstrong v. Manzo,* 380 U.S. 545, at 549: We granted certiorari. 379 U.S. 816. The questions before us are whether failure to notify the petitioner of the pendency of the adoption proceedings deprived him of due process of law so as to render the adoption decree constitutionally invalid, and, if so, whether the subsequent hearing on the petitioner's motion to set aside the decree served to cure its constitutional invalidity.

In disposing of the first issue, there is no occasion to linger long. It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. "Many controversies have raged about the

cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v.Central Hanover Tr. Co.*, 339 U.S. 306, 313. "An elementary and fundamental requirement of due process in any process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections. (citations omitted) Questions frequently arise as to adequacy of a particular form of notice in a particular case. (citations omitted) But as to the basic requirement of notice itself there can be no doubt, where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies. (citations omitted) The Texas Court of Civil Appeals implisitly recognized this constitutional rule, but held, in accord with its understanding of the Texas precedents, that whatever constitutional infirmity resulted from the failure to give the petitioner notice had been cured by the hearing subsequently afforded to him upon his motion to set aside the decree. We cannot agree.

Had the petitioner been given the timely notice which the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. (citations omitted) It would have been incumbent upon them to show not only that Salvatore Manzo met all the requisites of an adoptive parent under Texas law, but also to prove why the petitioner's consent to the adoption was not required. Had neither side offered any evidence, those who initiated the adoption proceedings could not have

prevailed.

Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of nonsupport made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved. The burden thus placed upon the petitioner were real, not purely theoretical. For "it is plain that where the burden of proof lies may be decisive of the outcome." (citations omitted) Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.

A fundamental requirement of due process is "the opportunity to be heard."

*Grannis v. Ordean,* 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

*Sniadach v. Family Finance Corp.,* 395 U.S. 337, at 339: We have dealt over and over again with the question of what constitutes "the right to be heard" (*Schoeder v. New York,* 391 U.S. 208, 212) within the meaning of procedural due process. *See Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 314. In the latter case we said that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U.S. at 314. In the context of this case the question is whether the interim freezing of the wages without a chance to be heard violates procedural due process.

A procedural rule that may satisfy due process for attachments in general, *See McKay v. McInnes,* 279 U.S. 820, does not necessarily satisfy procedural due process in every case. The fact that a procedure would

pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. We deal here with wages – a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process. *Sniadach* at 343, Apart from special situations, some of which are referred to in this Court's opinion. See ante, at 339, I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use. I think this is the thrust of the past cases in this Court. (citations omitted)

*Sniadach* at 350, This view is consistent with that expressed by Mr. Justice Frankfurter in *Rochin v. Calif.* that due process was to be determined by "Those canons of decency and fairness which express the notions of justice of English-speaking peoples ...."

*Goldberg v. Kelly,* 397 U.S. 254, 3. A pre-termination evidentiary hearing is necessary to provide the welfare recipient with procedural due process. Pp. 264, 266-271. (a) Such hearing need not take the form of a judicial or quasi-judicial trial, but the recipient must be provided with timely and adequate notice detailing the reasons for termination, and an effective opportunity to defend by confronting adverse witnesses and by presenting his arguments and evidence orally before the decision maker. Pp. 266-270. (c) The decision maker need not file a full opinion or make formal findings of fact or conclusions of law but should state the reasons for his determination and indicate the evidence he relies on. P.271. (d) The decision maker must be impartial and although prior involvement in some aspects of the case will not necessarily bar a welfare official from acting as

maker, he should not have participated in making the determination under review. P. 271. *Goldberg* at 262. The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *See also Hannah v. Larche*, 363 U.S. 420, 440, 442 (1960).

*Boddie v. Conn.*, 401 U.S. 254, at 377, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "[W]herever one is assailed in his person or his property, there he may defend," *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). *See Baldwin v. Hale*, 1 Wall. 223 (1864); *Hovey v. Elliott*, 167 U.S. 409 (1897). The theme that "due process of law signifies a right to be heard in one's defense," *Hovey v. Elliott*, supra, at 417, has continually recurred in the years since *Bladwin*, *Windsor*, and *Hovey*. Although "[m]any controversies have raged about the criptic and abstract words of the Due Process Clause," as Mr, Justice Jackson wrote for the Court in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), "there can be no doubt that at a minimum they require that deprivation of life, liberty

or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case," *Id.*, at 313.

Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, *see Windsor,* supra, at 278, or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication, *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 351 (1909). What the Constitution does require is "an **opportunity ...** granted at a meaningful time and in a meaningful manner," *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965) (emphasis added), "for [a] hearing appropriate to the nature of the case," *Mullane v. Central Hanover Tr. Co.,* supra, at 313. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. In short, "within the limits of practicability," *id.*, at 318, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.

*Bell v. Burson,* 402 U.S. 535, at 541, The hearing required by the Due Process Clause must be "meaningful," *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965), and "appropriate to the nature of the case."

*Mullane v. Central Hanover Bank & Trust Co.*, supra, at 313. It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard.

While "[m]any controversies have raged about ... the Due Process Clause," *ibid.*, it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" **before** the termination becomes effective. (citations omitted)

*Fuentes v. Shevin*, 407 U.S. 67, 1. The Florida and Pennsylvania replevin provisions are invalid under the Fourteenth Amendment since they work a deprivation of property without due process of law by denying the right to a prior opportunity to be heard before chattels are taken from the possessor. Pp. 80-93. *Fuentes*, at 80. For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 1 Wall. 223, 233. *See Windsor v. McVeigh*, 93 U.S. 274: *Hovey v. Elliot*, 167 U.S. 409; *Grannis v. Ordean*, 234 U.S. 385. It is equally fundamental that the right to notice and opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552.

The primary question in the present cases is whether these state statute are constitutionally defective in failing to provide for hearings "at a meaningful time."

*Parratt v. Taylor*, 451 U.S. 527, at 537, In some cases this Court has held that due process requires a

predeprivation hearing before the State interferes with any liberty or property interest enjoyed by its citizens. In most of these cases, however, the deprivation of property was pursuant to some established state procedure and "process" could be offered before any actual deprivation took place. For example, in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), the Court struck down on due process grounds a New York statute that allowed a trust company, when it sought a judicial settlement of its trust accounts, to give notice by publication to all beneficiaries even if the whereabouts of the beneficiaries were known. The Court held that personal notice in such situations was required and stated that "when notice is a person's due, process which is a mere gesture is not due process," *Id., at 315.* More recently, in *Bell v. Burson*, 402 U.S. 535 (1971), we reviewed a state statute which provided for the taking of the driver's license and registration of an uninsured motorist who had been involved in an accident. We recognized that a driver's license is often involved in the livelihood of a person and as such could not be summarily taken without a prior hearing. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), we struck down the Florida prejudgment replevin statute which allowed secured creditors to obtain writs in **ex parte** proceedings. We held that due process required a prior hearing before the State authorized its agents to seize property in a debtor's possession. *See also Boddie v. Connecticut*, 401 U.S. 371 (1971); *Goldberg v. Kelley*, 397 U.S. 254 (1970) and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). In all these cases, deprivations of property were authorized by an established state procedure and due process was held to require predeprivation notice and hearing in order to serve as a check on the possibility that a wrongful deprivation would occur.

*Commissioner v. Sunnen*, 333 U.S. 591, at 597, It is

first necessary to understand something of the recognized meaning and scope of **res judicata,** a doctrine judicial in origin. The general rule of **res judicata** applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac,* 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. *See Von Moschzisker, "Res Judicata,"* 38 Yale L.J. 299; Restatement of the Laws of Judgment, Sections 47, 48.

But where the second action between the same parties is upon a different cause or demand, the principal of **res judicata** is applied much more narrowly. In this situation, the judgment in the prior action operates as an estopple, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell v. County of Sac,* supra, 353. *And see Russell v. Place,* 94 U.S. 606; *Southern Pacific R. Co. v. U.S.,* 168 U.S. 1, 48; *Mercoid Corp. v. Mid-Continent Co.,* 320 U.S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at

issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the party, he cannot later renew the duel. In this sense, **res judicata** is usually and more accurately referred to as estopple by judgment, or collateral estopple. See Restatement of the Law of Judgment, Sections 68, 69, 70; Scott, "Collateral Estopple by Judgment," 56 Harv. L. Rev. 1.

These same concepts are applicable in the federal income tax field. Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is **res judicata** as to any subsequent proceeding involving the same claim and the same tax year. But if later proceeding is concerned with a similar or unlike claim relation to a different tax year, the prior judgment act as a collateral estopple only to matters in the second proceeding which were actually presented and determined in the first suit.

*United States v. International Building Co.*, 345 U.S. 502, (a) In a subsequent action between the same parties on a different claim, a judgment is conclusive only as to the point or question actually litigated and determined in the original action, not as to what might have been litigated and determined. Pp. 504-505. (b) The decisions entered by the Tax Court for the years 1933, 1938 and 1939 were only **pro forma** acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. P. 505.

The governing principle is stated in *Cromwell v. County of Sac*, 94 U.S. 351, 352-353. A judgment is an

absolute bar to a subsequent action on the same claim.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estopple only as to matters in issue or points controverted, upon the determination of which the finding or verdict was rendered . In all cases, therefore, where it is sought to apply the estopple of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." (citations omitted) Estopple by judgment, or collateral estopple as it is often called, is applicable in the federal income tax field. *Tait v. western Md. R. Co.*, supra, at 624; *Commissioner v. Sunnen*, supra, at 598.

We conclude that the decisions entered by the Tax Court for the years 1933, 1938 and 1939 were only a **pro forma** acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. There is no showing either in the record or by extrinsic evidence (*See Russell v. Place*, 94 U.S. 606, 608) that the issues raised by the pleadings were submitted to the Tax Court for determination or determined by the court. They may or may not have been agreed upon by the parties.

*Dziura v. U.S.*, 168 F.3d 581 (1st Cir. 1999) at 582, The Internal Revenue Code specifically provides that if the IRS, in the course of a tax collection effort, recklessly or intentionally disregards any provision of [the code]," the affected taxpayer(s) "may bring a civil action for damages against the United States in a district court of the United States." Id. Section 7433(a).

The rub is that all actions filed under 26 U.S.C. Section 7433(a) "may be brought only within 2 years after the date the right of action accrues." 26 U.S.C. Section 7433(d)(3). *Dziura* at 583, The implementing regulations suggest that this general rule also applies to cases under section 7433(a). See 26 C.F.R. Section 301.7433-1(g)(2) (stipulating that a cause of action brought under 7433(a) "accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action"). n.3

n.3 We do not foreclose the possibility that an unusual set of circumstances might arise in which a continuing violation theory would allow a taxpayer to assert that he could not have discovered the essential elements of his section 7433(a) claim until more than two years following the date of the initial wrong. *See, e.g. Hurt v. U.S.*, 914 F.Supp. 1346, 1355-56 & n.6 (S.D.W.Va. 1996). The instant case falls within the general rule, however, not within the longodds exception to it.

*Hurt v. U.S.*, 914 F.Supp. 1346 (S.D.W.Va. 1996), at 1355,

While there is authority to the contrary, several courts have concluded Section 2401(b) may be tolled in instances where the United States engaged in tortious conduct. *See, e.g., Wehrman v. U.S.*, 830 F.2d 1480 (8th Cir. 1987); *Page v. U.S.*, 729 F.2d 818, 821-22 (D.C.Cir. 1984) (stating "It is well-settled that '[w]hen a tort involves continuing injury, the cause of action accures, and the limitation period begins to run, at the time the tortious conduct ceases.' Since usually no single incident in a continuous chain of tortious activity can 'fairly or realistically be identified as the cause of significant harm,' it seems proper to regard the cumulative effect of the conduct as actionable."); *Gross v. U.S.*, 676 F.2d 295, 300 (8th Cir. 1982) (stating 'Where the tortious conduct is a

continuing nature, the **Kubrick** rule does not apply. Under the circumstances of this case, the focus should be on when the last tortious act occurred."). *Hurt* at 1356,

[17] Mr. Hurt alleges a continuing pattern of tortious harassment over the course of many years that has not abated to this day. His reliance on the continuing tort exception is particularly apropos because each individual audit and retaliatory action taken in isolation cannot "fairly or realistically be identified as the cause of significant harm[.]'" *Page*, 729 F.2d at 822. Rather, it is the "cumulative effect" of the harassment that is significant for litigation purposes. Id. The Court thus concludes Mr. Hurt is entitled to rely upon the continuing tort exception to Section 2401(b). Accordingly, his claim has not yet accrued under, much less been extinguished by, Section 2401(b). Defendants' argument to the contrary is without merit. n.6

n.6 The same is true under the limitations provisions for Section 7433. Section 7433(d)(3) provides as follows:

Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought ... only within 2 years after the date the right of action accrues. Id. Congress clearly intended a portion of the substantive law surrounding Section 2401(b) to be used in interpretation and application of Section 7433(d)(3). See, e.g., H.R.Conf.Rep. No. 1104, 100th Cong., 2d Sess. 228 n.1 (1988), reprinted in 1988 U.S.C.C.A.N. 5048, 5288 n. 1. (stating "The conferees intend that the general accural rule applied under the Tort Claims Act (28 U.S.C. sec. 2401(b) be applied to actions under this provision; the right of action does not accrue until a claimant has had a reasonable opportunity to discover all essential elements of a possible cause of action ...").

The Court thus concludes the continuing tort exception under Section 2401(b) would apply with equal force to the limitation period contained in Section 7433 (d)93).

*Gross v. U.S.*, 676 F.2d 295 (8th Cir. 1982), at 296, Statute of limitations on farmer's claim under Federal Tort Claims Act for intentional infliction of emotional distress arising out of county agricultural stabilization and conservation service committee conduct in denying him participation in feed grain program commenced to run not on date that farmer knew or should of known of his injury but on date of last tortious act, since committee's actions may have constituted continuing tort. 28 U.S.C.A. Section 2401(b).

*Wehrman v. U.S.*, 830 F.2d 1480 (8th Cir. 1987) When tort claim against United States accrues is question of federal law requiring determination of when plaintiff actually knew, or in exercise of reasonable diligence should have known, cause and existence of injury. 28 U.S.C.A. Sections 1346 et seq., 2401, 2401(b).

3. **Limitation of Actions**

Government's fraudulent concealment of material facts prevents running of statutory period governing claim under Federal Tort Claims Act until plaintiff discovers, or by reasonable diligence could discover, basis of claim. 28 U.S.C.A. Sections 1346 et seq., 2401, 2401(b), 2671 et seq.

5. **Limitation of Actions**

Under "continuing treatment doctrine," patient's cause of action does not accrue until tortious continuing treatment ends, even if patient is aware of facts constituting negligence before that time.

*Wehrman v. U.S.*, at 1481, In this appeal from a grant of summary judgment, the plaintiff, Floyd L. Wehrman, asserts that his claim for damages arising

out of alleged malpractice by the Veterans Administration hospital is not barred by the two-year limitation period set forth in 28 U.S.C. Section 2401(b), because the allegedly tortious continuing treatment did not end until some time within two years prior to his complaint. Because we disagree with the district court's determination that the "continuous treatment" doctrine is inapplicable in this case, we will vacate the district court's order and remand the case for further proceedings.

*Page v. U.S.*, 729 F.2d 818 (D.C. Cir., 1984), at 821,

[4] It is well-settled that "[w]hen a tort involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases. Since usually no single incident in a continuous chain of tortious activity can "fairly or realistically be identified as the cause of significant harm," it seems proper to regard the cumulative effect of the conduct as actionable. Moreover, since "one should not be allowed to acquire a right to continue the tortious conduct, it follows logically that statutes of limitation should not run prior to its cessation.

*Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 859 F.2d 865 (11th Cir. 1988) *Snook* at 866,

2. **Federal Civil Procedure**

If documents or other discovery sought would be relevant to the issues presented by motion for summary judgment, opposing party should be allowed opportunity to utilize discovery process to gain access to requested materials.

3. **Federal Civil Procedure**

Generally, summary judgment is inappropriate when party opposing motion has been unable to obtain responses to his discovery requests.

4. **Federal Civil Procedure**

Party opposing motion for summary judgment need not file affidavit pursuant to Rule 56(f) in order to

invoke protection of rule; interests of justice sometimes requires district court to postpone its ruling on motion for summary judgment even though technical requirements of rule have not been. met. Fed.Rules Civ.Proc. Rule 56(f), 28 U.S.C.A.

5. **Federal Civil Procedure**

Trial court improperly entered summary judgment in favor of trust company and trustees in action brought by trust beneficiers without first ruling on beneficiers' motion to compel discovery; many documents requested by beneficiaries were relevant to issues raised by motion for summary judgment and many of the requested documents were discoverable. *Snook* at 869, The defendants filed a general objection to all of plaintiffs' requests for discovery and, as noted above, the plaintiffs filed a motion to compel production of the documents requested. The district court never ruled on the motion. The plaintiffs argue that their inability to obtain the documents requested makes the granting of summary judgment improper.

In reviewing a district court's grant of summary judgment, this court's review is "plenary and is to be conducted utilizing the same legal standards as those imposed upon the district court." *WSB-TV v. Lee,* 842 F.2d 1266, 1269 (11th Cir. 1988). The Supreme Court has recently addressed the standards for granting motions for summary judgment. In *Celotex Corp. v. Catrett,* the Court addressed the burden to be placed on the nonmoving party as follows: In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, **after adequate time for discovery** and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265, 273 (1986) (emphasis added).

This court has recently considered the application of *Celotex,* and other recent Supreme Court cases, to cases in which the nonmoving party has not had an adequate opportunity to conduct discovery. In *WSB-TV v. Lee,* we reviewed the Supreme Court's decision in *Celotex,* in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed2d 202 (1986), and in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 547, 106 S.Ct. 1348, 89 L.Ed/ed 538 (1986). We concluded that the common denominator of the the three cases is "summary judgment may only be decided upon an adequate record." 842 F.2d at 1268, Because the plaintiffs in *WSB-TV* had been afforded no opportunity for discovery, we held that consideration of the defendant's motion for summary judgment was erroneous.

[1-3] This court has often noted that summary judgment should not be granted until the party opposing the motion has had an adequate opportunity for discovery. *E.g., Littlejohn v. Shell Oil Co.,* 483 F.2d 1140, 1145 (5th Cir. 1973) (en banc), cert. denied, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (noting the high fatality rate of summary dispositions at a time before the facts have been fully developed); *Alabama Farm Bureau Mutual Casualty Co. v. American Fidelity Life Insurance Co.,* 606 F.2d 602, 609 (5th Cir. 1979), cert. denied, 449 U.S. 820, 101 S.Ct. 77, 66 L.Ed.2d ("Summary Judgement should not, therefore, ordinarily be granted before discovery has been completed."); *Murrell v. Bennett,* 615 F.2d 306, 310 (5th Cir. 1980) Citing *Alabama Farm Bureau.* The party opposing a motion for summary judgment has a right to challenge the affidavits and other factual materials submitted in support of the motion by conducting sufficient discovery so as to enable him to determine whether he can furnish opposing affidavits. *Parrish v. Board of Commissioners of the Alabama State Bar,*

533 F.2d 942, 948 (5th Cir. 1976). If documents or other discovery sought would be relevant to the issues presented by the motion for summary judgment, the opposing party should be allowed the opportunity to utilize the discovery process to gain access to the requested materials. Id. Generally summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests. *Cowan v. J.C.Penney Co.Inc.*, 790 F.2d 1529, 1532 (11th Cir. 1986).

The issue of inadequate discovery was called to the district court's attention by the parties in their briefs addressed to the motion to compel. In their response to the plaintiffs' motion to compel, defendants asserted that a ruling in their favor on the pending motion to dismiss or for summary judgment would render moot any discovery issue. Plaintiffs responded to this assertion by reminding the district court that "motions for summary judgment are premature and should not be granted until the party opposing such motion is permitted to make discovery essential to his case." Therefore, the district court should have been aware of the plaintiffs' contention that they had not been able to obtain, through discovery, evidence essential to their opposition to the motion for summary judgment. The discovery requested was clearly relevant to pending motion for summary judgment, both as to the securities fraud and RICO counts.

[4] In this Circuit, a party opposing a motion for summary judgment need not file an affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure in order to invoke the protection of that Rule. In *Littlejohn*, the court "[o]ut of an abundance of caution and to prevent a possible injustice," held that an affidavit was not required to invoke the protection of Rule 56(f). 483 F.2d at 1146. The court concluded that "the written representation by [plaintiff's] lawyer, an

Officer of the court, it is the spirit of Rule 56(f) under the circumstances. Form is not to be exalted over fair procedures." Id. Requiring the party opposing a motion for summary judgment to explicitly and unequivocally invoke the protection of Rule 56(f) through the means of an affidavit would provide certainty to district courts. However, the law of this Circuit recognizes that the interests of justice will sometimes require a district court to postpone its ruling on a motion for summary judgment even through the technical requirements of Rule 56(f) have not been met

[5] In *Cowan*, this court held that the nonmovant's "failure to file a motion under Fed.R.Civ.P. 56(f) to foreclose entry of summary judgment [did] not invalidate her claim that the entry of that judgment was error." 790 F.2d at 1532. However, the party opposing the motion for summary judgment bears the burden of calling to the district court's attention any outstanding discovery. Id. At 1530. In *Cowen*, the court concluded that the nonmovant properly appraised the district court of the outstanding discovery requests.

[W]e find that prior to the entry of summary judgment she had properly brought to the district court's attention that the discovery response from World Shoe Corp. was still outstanding. The record clearly indicates that Cowen sought an order to compel World Shoe's response which was granted by the district court on Nov. 8, 1984. Id. At 1532.

In the case at hand, plaintiffs' filed a motion to compel, which was briefed extensively. The motion sought to compel the production of documents relevant to the pending motion for summary judgment. Therefore, plaintiffs properly directed the district court's attention to the fact that their discovery requests were still outstanding. The district court

should have ruled on the motion to compel prior to entering summary judgment for the defendants. Its failure to rule on the motion to compel circumvented the policy underlying discovery in cases in which a summary judgment motion is filed.

[T]he whole purpose of discovery in a case in which a motion for summary judgment is filed is to give the opposing party an opportunity to discover as many facts as are available and he considers essential to enable him to determine whether he can honestly file opposing affidavits. *Parrish*, 533 F.2d at 948. By failing to rule on the motion to compel, the district court deprived the plaintiffs' of their right to utilize the discovery process to discover the facts necessary to justify their opposition to the motion. It is clear that many of the documents requested are relevant to the issues raised by the defendants' motion for summary judgment. It is also clear that many of the requested documents are discoverable. Accordingly, the entry of summary judgment and dismissal of the pendent state law claims was improper and must be reversed. On remand the district court should consider the plaintiffs' motion to compel in light of the rules governing discovery and should order the requested documents produced as appropriate. Once there is an adequate record, the district court may again consider the defendant's motion for summary judgment.

*WSB-TV v. Lee*, 842 F.2d 1266 (11th Cir. 1988) at 1267,

1. **Federal Courts**

Grant of summary judgment before plaintiffs had been afforded opportunity for discovery was reversible error. *WSB-TV* at 1269, Our review of the district court's grant of summary judgment is plenary and is to be conducted utilizing the same legal standards as those imposed upon the district court. *Merchantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838,

841, (11th Cir. 1985). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories , and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c)

Three recent Supreme Court cases vacating appellate reversals oh district court orders granting summary judgment illuminate both the utility and the limitations of summary procedure. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Their common denominator is the Court's caveat that summary judgment may only be decided upon an adequate record.

In *Anderson,* the Court held that Rule 56(e) provides that, "when a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.' 106 S.Ct. at 2511.

The Court underscored that:

This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

Id. At n.5.

In *Celotex,* the Court held that "Rule 56(c mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof

at trial" but only "after adequate time foe discovery." 106 S.Ct. at 2552-53. In concluding that the district court had properly granted summary judgment, the Court noted that "[t]he parties had conducted discovery, and no serious claim can be made that respondent was in any sense 'railroaded' by a premature motion for summary judgment." 106 S.Ct. at 2554. Recognizing that premature motions present a problem, the Court concluded that the problem: can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery. 106 S.Ct. at 2554-55.

In *Matsushita*, 106 S.Ct. at 1352, the Court considered it significant that the parties had conducted "several years of detailed discovery."

[1] In the case **sub judice** plaintiffs had been afforded no opportunity for discovery. Under circumstances outlined above, consideration of defendant's motion for summary judgment in this six- month old case was erroneous. *Parrish v. Board of Commissioners*, 533 F.2d 942, 951 (5th Cir. 1976) (trial court did not allow relevant discovery; summary judgment was reversed).

[2] Moreover, with gaze too foreshortened upon physical encounter on November 6, 1968, the court did not discuss and apparently failed to consider conflicting inferences, reasonable to be drawn from all of the affidavits on file, as to the motivation of the sheriff's conduct on that occasion.

In determining whether the party who moves for summary judgment has met his burden of establishing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law, the evidence and inferences drawn from the evidence are viewed in light most favorable to the nonmoving party, and all reasonable doubts are resolved in his

favor. *Mercantile Bank*, supra, 750 F.2d at 841. In deciding whether an inference is reasonable, the court must "cull the universe of possible inferences from the facts established by weighing each other against the abstract standard of reasonableness." *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F2d 485, 493 (5th Cir.Unit B 1982). The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. Id at 495. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one. Id.

After a careful review of the record, we are persuaded that a reasonable inference to be drawn from affidavits submitted by plaintiffs is that the November 6th incident was but one episode in the ongoing effort of defendant to thwart or impede plaintiffs in gathering and reporting news relating to rumors of the sheriff's use of inmate labor on his private property, an interference with plaintiffs' first amendment rights which would violate 42 Section 1983. Thus, the entry of summary judgment was interdicted and requires reversal.

REVERSED and REMANDED.

*Cowan v. J.C. Penney Co., Inc.* 790 F.2d 1529 (11th Cir. 1986)

1. **Federal Civil Procedure**

Party opposing motion for summary judgment bears responsibility for bringing to trial court's attention any outstanding discovery in the cause. Fed.R,Civ.P. Rule 56(f), 28 U.S.C.A.

2. **Federal Civil Procedure**

In slip and full case alleging defective condition of shoe and negligence of store owner due to unsafe condition of store premises, there were genuine issues

of material fact as to fitness of shoe, slippery condition of floor and raised condition of metal strip, precluding summary judgment. Fed.R.Civ.P. 56(c), 28 U.S.C.A.; Ala. Code 1975, Section 7-2-314(2)(c).

.3. **Federal Civil Procedure**

Prior to entry of summary judgment against her, plaintiff had properly brought to the district court's attention that discovery response from defendant was outstanding, and her failure to file motion to foreclose entry of summary judgment did not invalidate her claim that entry of judgment was error. Fed.R.Civ.P. Rule 56(f), 28 U.S.C.A. *Cowen* at 1530.

On appeal, Cowen challenges the grant of summary judgment as inappropriate on two grounds. First, she claims that there was a genuine issue as to a material fact in dispute upon which summary judgment cannot be based. Second, she claims that summary judgment at this time is precluded because her interrogatories to appellees are still outstanding, in spite of a district court order compelling response.

Appellees argue that the district court was correct in granting their motions for summary judgment because there was no genuine issue as to a material fact in dispute and they were therefore entitled to summary judgment as a matter of law. They assert that the outstanding discovery request does not preclude summary judgment because Cowen did not make an adequate showing under Fed.R.Civ.P. 56(f) to delay entry of summary judgment.

When reviewing a district court order granting summary judgment, this court applies the same legal standard as does the district court. *Thrasher v. State Farm Fire & Casualty Co.*, 734 F.2d 637, 638 (11th Cir. 1984). Under Fed.R.Civ.P. 56(c) summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The court must view the evidence in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970).

[1] The moving party bears the burden of demonstrating the absence of a dispute as to any material fact and of showing that he or she is entitled to judgment as a matter of law. Id, *Combs v. King*, 764 F.2d 818, 827 (11th Cir. 1985). Once a motion for summary judgment has been made and supported as required, however, the opposing party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). If the opposing party has difficulty in obtaining affidavits or discovery, he or she may seek a continuance under Fed.R.Civ/P. 56(f). The opposing party bears the responsibility of bringing to the trial court's attention any outstanding discovery in the cause.

The record on appeal in the instant case reflects the following discovery efforts and pleadings, *Cowen* at 1531,

Following World Shoe Corp.'s summary judgment motion, Cowan filed a motion for a order compelling World Shoe Corp. to answer interrogatories propounded by plaintiff, which was granted Nov. 8. On Nov. 14, Cowan propounded a second set of interrogatories and requests for production on defendants. No response to these discovery requests were ever received. After the court notified the parties on Nov. 21 that the two motions for summary judgment were going to be taken under advisement on Dec. 5, Cowen filed an affidavit on Dec. 4, 1985,

repeating her statements that the heel cap had come off her shoe, that the metal strip was part of the cause of her fall, and that the floor had been slippery. etc.

On the basis of the record, the district court granted the defendant's motions for summary judgment an Apr. 12, 1985. Cowen filed a motion for reconsideration on April 19, 1985, etc. The district court denied the motion for reconsideration on May 20, 1985.

[2] We find that the district court erred in granting summary judgment. The affidavits, deposition, and responses to discovery indicate that there were genuine disputes as to material facts. Etc. *Cowan* at 1532,

[3] Cowan's failure to file a motion under Fed.R.Civ.P. 56(f) to foreclose entry of summary judgment does not invalidate her claim that the entry of that judgment was error. The purpose of Rule 56(f) is to allow parties opposing summary judgment an opportunity to obtain additional time or to be excused from obtaining unavailable affidavits or other discovery. Cowan, however, had already filed answers to interrogatories, a deposition, and an affidavit as to the disputed facts, etc. We have held that, generally, summary judgment is premature when the moving party has not answered the opponent's interrogatories. *Murrell v. Bennett*, 615 F.2d 306, 310 (5th Cir. 1980) We find that especially true in this case where Cowen propounded interrogatories to World Shoe Corp. which request information that is critical to the issues in dispute.

We find that summary judgment was improper as a matter of law on the record of this case, We therefore REMAND the case to the district court for trial on the merits.

*Murrell v. Bennett*, 615 F.2d 306 (5th Cir. 1980) at 310,

[3] Appellees also assert that Murrell did not meet his burden of rebutting their showing by supplying affidavits or other material evidence. *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Garcia v. American Marine Corp.*, 432 F.2d 6 (5th Cir. 1970).

The absence of documents for Murrell is the very injustice of this case. Indigent prisoners are hampered in their access to the proof necessary to ward off summary judgment. Murrell had no opportunity to provide this information because his unschooled attempts at requesting discovery were nipped in the bud only thirty-two days after the complaint was filed. This court noted in *Alabama Farm* that summary judgment normally should not be granted before discovery is completed. 606 f.2d at 609. Murrell's discovery was never allowed to begin, etc. Although his documents may be inartful, the thrust of his requests was clear: he wanted the chance to show that material disputes did exist.

Summary judgment is a valuable judicial tool. Because its consequences are so severe, however, we must always guard against premature truncation of ligitimate lawsuits merely because of unskilled presentations. The district court's judgment is REVERSED.

*Alabama Farm Bureau Casualty Co., Inc., v. American Fidelity Life Insurance Company, etc. et al.*, 606 F.2d 602 (5th Cir. 1979) at 603,

**(4) Federal Civil Procedure**

Burden is on party seeking summary judgment to show that there is no genuine issue of material fact.

**(5) Federal Civil Procedure**

In considering a summary judgment motion, the inferences most favorable to the party opposing the motion will be drawn, as such inferences may create disputes regarding the basic facts or regarding facts to

to be inferred from such facts.

**(6) Federal Civil Procedure**

Summary Judgment should not ordinarily be granted before discovery has been completed, especially in a stockholder's derivative action.

**(7) Federal Civil Procedure**

Summary judgment may be inappropriate, even though basic facts are undisputed, if the ultimate facts in question are to be inferred from them, and the parties disagree regarding the permissible inferences that can be drawn from the basic facts.

**(8) Federal Civil Procedure**

Where a jury is called for, litigants are entitled to have the jury choose between conflicting inferences from basic facts, however, where the judge is a trier of fact he may be in a position, for summary judgment purposes, to draw inferences without resort to the expense of trial, unless there is an issue of witness' credibility.

*Alabama* at 607,

Alabama Farm made a number of attempts to exercise its discovery rights, but they were largely resisted by the defendants, and the district court did not order full discovery. For example, the defendants were served with interrogatories in January, 1975, but only one interrogatory was answered, and that was only after the district court had ordered a response.

In January, 1975, Alabama Farm also sought the protection of minute books of AMFI's Executive Committee, Finance Committee and Board of Directors. These books were never produced, even through Alabama Farm offered to examine them at any location specified by the defendants so as not to disrupt AMFI's operations. The district court never heard or ruled on two motions Alabama Farm filed seeking to compel production of these records.

*Alabama* at 609,

[4,5] The burden is on the party seeking summary judgment to show that there is no genuine issue of material fact. The "party opposing the motion is to be given the benefit of all reasonable doubt determining whether a genuine factual issue exists." *Kellerman v. Askew* , 541 F.2d 1089, 1092 (5th Cir. 1976). In considering a summary judgment motion, the inferences most favorable to the party opposing the motion will be drawn. *Boazman v. Economics Lab., Inc.*, 537 F.2d 210, 214, (5th Cir. 1976) Such inferences may create disputes regarding basic facts or regarding facts to be inferred from such facts.

[6] "In applying the basic principles the factor of access to proof must, however, be seriously considered in ruling on a defendant's motion for summary judgment, particularly in [a stockholder's derivative action] where plaintiff's proof must come mainly from sources largely within the control of the defendants and from the mouths of the alleged wrongdoers." 6 Moore's Federal Practice Section 56.17[60] at 56-1065 (1976 ed.)(footnotes omitted). Summary judgment should not, therefore, ordinarily be granted before discovery has been completed. (citations omitted) "' Cases in which the underlying issue is one of motivation, intent, or some other subjective fact are particularly inappropriate for summary judgment, as are those in which the issues turn on the credibility of the affients.' (citations omitted)

[7,8] Summary judgment may be improper, even though the basic facts are undisputed, if the ultimate facts in question are to be inferred from them, and the parties disagree regarding the permissible inferences that can be drawn from the basic facts. *Winter v. Highlands*, 569 F.2d 297, 299, (5th Cir. 1978) "'[The choice between permissible inferences is for the trier of facts.' " *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124, quotimg, *Walker v. U.S. Gypsum.*, 363 U.S. 805,

80 S.Ct. 1240, 4 L.Ed.2d 1148. Where a jury is called for, litigants are entitled to have the jury choose between conflicting inferences from basic facts. *Nunez*, supra, 572 F.2d at 1124. However, where the judge is the trier of fact, as was the case here, he may be in a position to draw inferences without resort to the expense of trial, unless there is an issue of witness credibility. See id. at 1124-25.

*Alabama* at 617,

Although Alabama Farm's suit is premised, at this point, on unproved inferences from circumstantial evidence, it states a cause of action and involves disputed issues of fact; therefore, under Federal Rules of Civil Procedure, Alabama Farm has a right to further discovery. *See Subin v. Goldsmith*, supra, 224 F.2d at 761.

*Parrish v. Board of Com'rs of Alabama State Bar*, 533 F.2d 942 (5th Cir. 1976) at 943,

**[2] Federal Civil Procedure**

Trial court in class action by blacks alleging racial discrimination by Boards of Commissioners and Bar Examiners of Alabama Bar Association in their policies and practices governing admission to bar erred in entering summary judgment against plaintiffs without requiring production of examination papers and graders' notes requested by plaintiffs as part of their pretrial discovery. 28 U.S.C.A. Sections 2201, 2201; 42 U.S.C.A. Sections 1981-1983; Fed.R.Civ.P. Rule 56(f), 28 U.S.C.A.

*Parrish* at 946,

IV. PROPRIETY OF SUMMARY JUDGMENT.

With these preliminary considerations aside, we come to the appellants' principal argument: that summary judgment in this case was inappropriate, because the trial court did not allow complete discovery. Appellants also argue that there were material issues of fact that the appellees were not

entitled to summary judgment on the law, but their main contention is that summary judgement was precluded as a matter of law because there were outstanding motions to compel interrogatories and that without this information they were unable to prepare adequately their affidavits in opposition to the motion for summary judgment.

(A) Adequacy of Discovery

[2] The appellees moved for summary judgment on April 12, 1973, and on April 20, the court held a hearing to consider the motion. The court asked counsel for the appellants pointedly what further discovery they needed in order to "present by affidavit facts essential to justify your opposition" to the motion for summary judgment. Counsel for the appellants replied that they needed answers from the Chairman of the Board of Examiners to interrogatories and the transcripts of depositions taken of two of the bar examiners. After agreeing that it would reserve these items, the trial court then asked counsel for the appellants: "Now, what other discovery are you seeking?" Counsel replied: "Well, in light of our discussion this morning we also would need to inspect the minutes [of the state bar association] again. We have a motion for production of documents. We will need to see the files of persons who have applied to take the bar examination."

In the four months intervening between this hearing and the issuance of the order granting summary judgment, the appellants accomplished all of the discovery they had requested at the hearing—with one exception: the appellees failed to produce the "documents" mentioned by the counsel for the appellants, which consisted of all answer sheets and all grading notes made by the examiners for the Feb., 1973, bar examination. Appellants filed a motion to compel production of these documents on May 28, but

the trial court never ruled on the motion.
*Parrish* at 948,

It is horn-book law that a trial court may not grant a motion for summary judgment unless "the basic facts are undisputed and that there is no dispute between the parties as to any factual inferences that may be drawn from such facts ..." *Sinderman v. Perry*, 430 F.2d 939 (5th Cir. 1970), aff'd, 408 U.S. 593, 93 S.Ct. 2694, 33 L.Ed.2d 570, and that "all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion for summary judgment." *Time, Inc, v. Ragano*, 427 F.2d 219 (5th Cir. 1970).
*Parrish* at 951,

We conclude that the trial court erred in entering summary judgment without having first required the defendants to make available for inspection as requested by the plaintiffs the examination papers and graders' notes, if any, for the year 1973.

The judgment of the trial court is REVERSED and REMANDED for further proceedings not inconsistent with this opinion.
*Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986)
**(1) Federal Civil Procedure**
Entry of summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish that existence of an element essential to that party's case and on which that party will bear the burden of proof at trial, Fed.R.Civ.P. Rule 56(c), 28 U.S.C.A.
**(2) Federal Civil Procedure**
Party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories , and admissions on file, together with

affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Fed.R.Civ.P.. Rule 56(c), 28 U.S.C.A.

**(7) Federal Civil Procedure**

Nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Fed.R.Civ.P. Rule 56(e), 28 U.S.C.

*Celotex* at 2552,

"[T]h[e] standard [for granting summary judgment] mirrors the standards for a directed verdict under Federal Rule of Civil Procedure 50(a) ..." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986)

[3-5] Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, identifying those portions of " the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, "which it believes demonstrate the absence of a genuine issue of material fact.

[7] We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

*Celotex* at 2554,

Respondent commenced this action on Sept. 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense

"railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), n.6

n.6 Rule 56(f) provides:

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just."

which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

*Celotex* at 2555,

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

The judgment of the Court of Appeals is accordingly reversed, and the case remanded for further proceedings consistent with this opinion.

*Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (S.Ct. 1986), at 582,

We granted certiorari to determine (I) whether the Court of Appeals applied the proper standards in evaluating the district court's decision to grant petitioner's motion for summary judgment.

*Matsushita* at 585,

The issues in this case thus become whether

respondents adduced sufficient evidence in support of their theory to survive summary judgment. We therefore examine the principles that govern summary judgment determination.

To survive petitioners' motion for summary judgment, n.10 respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. Fed.R.Civ.P. Rule 56(e); n.11 *First National Bank of Arazonia v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)

n.10 Respondents argued before the district court that petitioners had failed to carry their initial burden under Fed.R.Civ.Proc. Rule 56(c) of demonstrating the absence of a genuine issue of material fact, *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

n.11 Rule 56(e) provides, in relevant part:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him."

Second, the issue of fact must be "genuine." Fed.R.Civ.P. 56 (c). When the moving party has carried its burden under Rule 56(c), ( n.12 See n. 10, supra.) its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *See deLuca v. Atlantic Refining Co.*, 176 F.2d 421, 423 (CA2 1949) (L. Hand, J.), cert. denied, 338 U.S. 943 (1950); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure Section 2727 (1983); Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493,

504-505 (1950). Cf. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944). In language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a **genuine issue for trial.**" Fed.R.Civ.P. 56(e) (emphasis added) See also Advisory Committee Note to 1963 Amendment of Fed.R.Civ.P. 56(e), 28 U.S.C.App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Cities Service*, supra, at 289.
*Matsushita* at 587.

Respondents correctly note that "[o]n summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)
*Matsushita* at 600.
In a similar vein, the Court summarizes *Monsanto Co. v.Spray-Rite Service Corp.*, supra, as holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible ..." Ante, at 593. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury. These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.
*Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (S.Ct. 1970)

(1) The district court on the basis of the record erred in granting summary judgment on the conspiracy count. Pp. 149-161.

.(a) The involvement of a policeman, a state official, whether or not his actions were lawful or authorized, in the alleged conspiracy would plainly provide the state action needed to show a direct violation of petitioner's Fourteenth Amendment rights entitling her to relief under Section 1983, and private persons involved in such a conspiracy are acting "under color" of law and can be liable under Section 1983. Pp. 150-152.

.(b) Respondent did not carry out its burden, as the party moving for summary judgment, of showing the absence of a genuine issue as to any material fact, as it did not foreclose the possibility that there was a policeman in the store while the petitioner was awaiting service (from which the jury could infer an understanding between the officer and an employee of respondent that petitioner not be served), and its failure to meet that burden requires reversal. Pp. 153-159.

.(c) Because respondent failed to meet its initial burden as the party moving for summary judgment, petitioner was not required to come forward with suitable opposing affidavits under Fed.R.Civ.P. 56(e). Pp. 159-161.

*Adickes* at 148,

As explained in Part I, because the respondent failed to show the absence of any disputed material fact, we think the district court erred in granting summary judgment.

*Adickes* at 153,

We now proceed to consider whether the district court erred in granting summary judgment on the conspiracy count. In granting respondent's motion, the district court simply stated that there was "no

evidence in the complaint or in the affidavits and other papers from which 'reasonably-minded person' might draw an inference of conspiracy," 252 F.Supp., at 144, aff'd, 409 F.2d, at 126-127. Our own scrutiny of the factual allegations of petitioner's complaint, as well as the material found in the affidavits and depositions presented by Kress to the district court, however, convinces us that summary judgment was improper here, for we think respondent failed to carry its burden of showing the absence of any genuine issue of fact. *Adickes* at 157,

We think that on the basis of the record, it was error to grant summary judgment. *Adickes* at 158,

Because "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving parties] materials must be viewed in the light most favorable to the party opposing the motion," *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), we think respondent's failure to show there was no policeman in the store requires reversal.

Pointing to Rule 56(e), as amended in 1963, respondent argues that it was incumbent on petitioner to come forward with an affidavit properly asserting the presence of the policeman in the store, if she were to rely on the fact to avoid summary judgment. Respondent notes in this regard that none of the materials upon which petitioners relied met the requirements of Rule 56(e).

This argument does not withstand scrutiny, however, for both the commentary on and background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact. The Advisory Committee note on the amendment states

that the changes were not designed to "affect the ordinary standards applicable to the summary judgment." And, in a comment directed specifically to a contention like respondent's, the Committee stated that "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied **even if opposing evidentiary matter is presented.**" Because respondent did not meet its initial burden of establishing the absence of a policeman in the store, petitioner here was required to come forward with suitable opposing affidavits.

*Combs v. King,* 764 F.2d 818 (11th Cir. 1985) at 819,

**.7. Federal Civil Procedure**

Party seeking summary judgment bears exacting burden of showing both there is no actual dispute as to any material fact and that moving party is entitled to judgment as a matter of law.

.C. **Summary Judgment** *Combs* at 827.

.[7] " On appeal from summary judgment the record must be viewed in the light most favorable to the party opposing the motion." *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.,* 479 F.2d 135, 138 (5th Cir. 1973). The party seeking summary judgment bears the exacting burden of showing both that there is no actual dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Id.

In this case, the Trustees' burden in responding to the summary judgment motion was to offer significant probative evidence that tended to support its complaint. *Pan Islamic Trade Corp. v. Exxon,* 632 F.2d 539, 554 (5th Cir. 1980), cert. denied, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981).

.[8] The trustees met their burden when they produced the affidavits of two of Mrs. King's

employees and of the certified public accountant. These affidavits raised genuine questions about the accuracy of Mrs. King's records and the number of hours worked by her employees.

Given the ambiguities in the record, the conflicting versions regarding the number of hours worked by Mrs. King's employees, and the competing factual inferences that arose, it is clear that Mrs. King should not have obtained a summary judgment. She failed to carry the burden of demonstrating that there is no actual dispute as to the material facts in the case. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970).

For reasons stated above, we hold that the district court erred in granting summary judgment.

.III. CONCLUSION

The district court erred when it found that Mrs. King did not have a duty to maintain records and did not have the burden of proving the actual numbers of hours worked in the absence of clear records. The court also erred in granting summary judgment. For these reasons we REVERSE and REMAND to the district court for further consideration in light of this opinion.

REVERSED and REMANDED.

*Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d *38 (11th Cir. 1985)

**.1. Federal Courts**

Court of Appeals must independently review district court's order granting summary judgment and determine whether any genuine issue of material fact exists. Fed.R.Civ.P. Rule 56(c), 28 U.S.C.A.

**.2. Federal Courts**

When Court of Appeals examines a decision granting or denying summary judgment, it applies same legal standards that control district court's determination. Fed.R.Civ.P. Rule 56(c), 28 U.S.C.A.

**.3. Federal Civil Procedure**

A party seeking summary judgment bears burden of demonstrating that no genuine dispute exists as to any material fact in case. Fed.R.Civ.P. Rule 56(c), 28 U.S.C.A.

**.4. Federal Courts**

In determining whether a movant has met burden on motion for summary judgment of demonstrating that no genuine dispute exists as to any material fact, Court of Appeals reviews evidence and all factual inferences therefrom in light most favorable to party opposing motion, with reasonable doubts about facts resolved in favor of nonmovant. Fed.R.Civ.P. Rule 56(c),U.S.C.A.

**.5. Federal Civil Procedure**

If reasonable minds might differ on inferences arising from undisputed facts, then a court should deny summary judgment.

*Mercantile* at 841,

Issue

The sole issue on appeal is whether the district court erred in granting the government's motion for summary judgment.

Discussion

.[1,2] Appellant, Mercantile Bank and Trust Company, Ltd., contends that the district court erred in its determination that no genuine issue of material fact exists as to the ownership of the collateral deposit funds interpleaded in this action. We must independently review the district court's order granting summary judgment and determine whether any genuine issue of material fact exists. Fed.R.Civ.P. 56(c); *Morrison v. Washington County, Alabama*, 700 F.2d 678 (11th Cir. 1983). When we examine a decision granting or denying summary judgment, we apply the same legal standards that control the district court's determination. *Environmental Defense Fund v. Marsh*,

651 F.2d 983, 991 (5th Cir. 1981).

.[3-5] A party seeking summary judgment bears the burden of demonstrating that no genuine dispute exists as to any material fact in the case. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Clemons v. Dougherty County, Georgia*, 684 F.2d 1365 (11th Cir. 1982). In determining whether a movant has met this burden, we review the evidence and all factual inferences therefrom in light most favorable to the party opposing the motion. *Adickes*, 398 U.S. at 157, 90 S.Ct. at 1608. All reasonable doubts about the facts are resolved in favor of the non-mavant. *Casey Enterprises v. Am. Hardware Mutual Insurance Co.*, 655 F.2d 598, 602 (5th Cir. 1981). If reasonable minds might differ on the inferences arising from undisputed facts, then a court should deny summary judgment. *Impossible Electronics Techniques, Inc. v.Wackenhut Protective System, Inc.*, 669 F.2d 1026, 1031 (5th Cir. Unit B 1982); *Croley v. Matson Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970).

*Mercantile* at 844,

Summary judgment is a useful device, however, if it is not used with caution, it inevitably leads to drastic results. *See Murrell v. Bennett*, 615 F.2d 306, 309 (5th Cir. 1980) Mercantile's burden in responding to the summary judgment motion was to offer significant probative evidence that tended to support its complaint. *See Pan-Islamic Trade Corp. v. Exxon*, 632 F.2d 539, 554 (5th Cir. 1980), cert. denied, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981) Mercantile met its burden. Because this case should have been remanded to the district court for further development of the record, I must dissent.

*Thrasher v. State Farm Fire & Cas., Co.*, 734 F.2d 637 (11th Cir. 1984)

.1. **Federal Courts**

Order granting summary judgment must be independently reviewed by the Court of Appeals.

.2. **Federal Courts**

In reviewing grant of summary judgment, question is whether any genuine issue of material fact exists. Fed.R.Civ.P. 56(c). 28 U.S.C.A.

.3. **Federal Courts**

When examining decision granting or denying summary judgment, Court of Appeals applies same legal standards as those that control district court in determining whether summary judgment is appropriate. Fed.R.Cic.P. 56(c) 28 U.S.C.A.

.4. **Federal Civil Procedure**

Party seeking summary judgment bears burden of demonstrating that no genuine dispute exists as to any material fact in case; when determining whether movant met its burden, courts should review evidence and all factual inferences therefrom in light most favorable to party opposing motion. Fed.R,Civ.P. 56(c),28 U.S.C.A.

.5. **Federal Civil Procedure**

In reviewing motion for summary judgment, all reasonable doubts about facts should be resolved in favor of nonmovant, and if reasonable minds might differ on inferences arising from undisputed facts, then court should deny summary judgment. Fed.R.Civ.P. 56©, 28 U.S.C.A.

*Thresher* at 638,

Issue

The sole issue before us is whether the district court's order granting summary judgment in favor of State Farm was properly entered.

Discussion

.[1-3] An order granting summary judgment must be independently reviewed by this Court. *Morrison v. Washington County, Alabama*,700 F.2d 678 (11th Cir.

1983). In reviewing the grant of summary judgment, the question is whether any genuine issue of material fact exists. Fed.R.Civ.P. 56(c). When examining a decision granting or denying summary judgment, this court applies the same legal standard as those that control the district court in determining whether summary judgment is appropriate. *Enviromental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981).

.[4] The party seeking summary judgment bears the burden of demonstrating that no genuine issue exists as to any material fact in the case. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Clemonds v. Dougherty County, Georgia*, 684 F.2d 1365 (11th Cir. 1982). We, therefore, must determine whether appellee, State Farm, has met its burden.

When determining whether the movant has met its burden, courts should review the evidence and all factual inferences therefrom in a light most favorable to the party opposing the motion. *Adickes*, 398 U.S. at 157, 90 S.Ct. at 1608; *Impossible Electronics Techniques, Inc v. Wackenhut Protective System, Inc.*, 669 F.2d 1026 (5th Cir. Unit B 1982).

.[5] Moreover, all reasonable doubts about the facts should be resolved in favor of the nonmovant. *Casey Enterprises v. Am. Hardware Mutual Insurance Co.*, 655 F.2d 598, 602 (5th Cir. 1981). If reasonable minds differ on the inferences arising from undisputed Facts, then a court should deny summary judgment. *Impossible Electronics Techniques, Inc.*, 669 F.2d at 1031; *Croley v. Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970).

*United States v. Diebold*, 369 U.S. 654 (S.Ct. 1962) at 655, On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable

to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the court might be permissible, the materials before the district court having raised a genuine issue as to ultimate facts material to the rule of *International Shoe Co. v. Federal Trade Comm,n.*, it was improper for the district court to decide the applicability of the rule on a motion for summary judgment. Fed.R.Civ.P., 56(c). **Reversed and remanded.**

*Haines v. Kerner et al,* 404 U.S. 519 (S.Ct. 1971)

Prisoner's **pro se** complaint seeking to recovery damages for claimed physical injuries and deprivation of rights in imposing disciplinary confinement should not have been dismissed without affording his the opportunity to present evidence on his claims. 427 F.2d 71, reversed and remanded.

*Haines* at 520,

We granted certiorari and appointed counsel to represent petitioner. The only issue before us is petitioner's contention that the district court erred in dismissing his **pro se** complaint without allowing him to present evidence on his claims.

Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the **pro se** complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). *See Dioquardi v. Durning,* 139 F.2d 774 (CA2 1944).

Accordingly, although we intimate no view

on the merits of petitioner's allegations, we conclude that he is entitled to an opportunity to offer proof. The judgment is reversed and the case is remanded for further proceedings consistent herewith.

**Reversed and remanded.**

*Jackson v. Reese*, 608 F.2d 159 (5th Cir. 1979)

**.1. Federal Civil Procedure**

Courts are required to liberally construe pro se complaints, and thus state prisoner's civil rights complaint against State Parole Board should not have been dismissed unless it appeared that he could prove no set of facts which would entitle him to relief.

**.2. Constitutional Law**

Since state prisoner had not shown a deprivation of a constitutionally protected interest, in that denial of parole did not amount to loss of liberty in the due process context, federal court, in prisoner's civil rights action against State Parole Board, did not need to address whether the board's procedures comported with due process. 42 U.S.C.A. Section 1983; U.S.C.A. Const. Amend. 14.

.[1] The issue presented in this action is whether appellant set fourth specific facts that would, if proved, warrant the relief he sought. It is axiomatic that courts are required to liberally construe pro se complaints. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (5th Cir. 1972) Appellant's complaint should not have been dismissed unless it appeared that he could prove no set of facts which would entitle him to relief. *Conley v. Gibsom*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1958); *accord Johnson v. Wells*, 566 F.2d 1016 (5th Cir. 1978). We hold that the district court properly dismissed appellant's complaint.

.[2] The threshold question under Section 1983 is whether the complainant has been deprived of a cognizable liberty or property interest. The Supreme

Court has held that the denial of parole, as distinguished from the revocation of parole, does not amount to a loss of liberty in the due process context. (citations omitted) Since appellant has not shown a deprivation of a constitutionally protected interest, this Court need not address whether the Georgia Parole Board's procedures comport with due process, Id. At 1053.

Recusal statute, 28 U.S.C. Section 455(a) and (b), requires mandatory disqualification of judge in any proceeding in which his impartiality might be reasonable be questioned or where he has personal bias or prejudice concerning party. *United States v. Brown,* 539 F.2d 467 (5th Cir. 1976), *citing In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625; *Tumey v. Ohio,* 273 U.S. 510, 532, 47 S.Ct. 437, 444; *Offutt v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 13. Congress' purpose in amending 28 U.S.C. Section 455 was to reconcile 1972 Code of Judicial Conduct with federal statute and to eliminate dual standards, statutory and ethical, couched in uncertain language that had effect of forcing judge to decide either legal or ethical issue at his peril, and to overrule concept that close cases involving disqualification should be resolved on ground that judge had "duty to sit." *SCA Services, Inc. v. Morgan,* 557 F.2d 110 (7th Cir. 1977). Purpose of enactment of amendments to 28 U.S.C. Section 455 was to adopt categorical rule that would be self-enforcing. *McCuin v. Texas Power & Light Co.,* 714 F.2d 1255, (5th Cir. Tex. 1983), quoting *McCuin* at 1265, Other ethical precept's also limit the lawyer's conduct, Canon 9 of the Code of Professional Responsibility provides: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."; 28 U.S.C. Section 144 expressly conditions relief upon filing of timely and legally sufficient affidavit; no such

procedural requirement is contained in 28 U.S.C. Section 455, which is directed to judge, is self-enforcing and places judge sitting on case under duty to recuse himself if he is aware of ground for recusal under Section 455; thus Section 455 modifies Section 144 in requiring judge to go beyond Section 144 affidavit and to consider merits of motion pursuant to Section 455. *United States v. Silba,* 624 F.2d 864 (9th Cir. 1980).

Even if affidavit filed under 28 U.S.C. Section 144 is inadequate, district judge has independent duty to recuse himself under 28 U.S.C. Section 455(a) which is self-executing provision specifying no particular procedure that party must follow; instead, Section 455(a) sets forth mandatory guideline which federal judge must observe sua sponte. *Roberts v. Bailer,* 625 F.2d 125 (6th Cir. 1980). 28 U.S.C. Section 455(a) is broader than 28 U.S.C. Section 144, and applies to any judge and includes proceeding in which his impartiality might be reasonably questioned; Congress enacted revision to 28 U.S.C. Section 455(a) in order to substitute objective test of reasonableness for subjective test of former 28 U.S.C. Section 455, and under broader standard of revised 28 U.S.C. Section 455(a), disqualification is appropriate not only where there is actual or apparent bias or prejudice but also when circumstances are such that judge's impartiality might be reasonably questioned; grounds for disqualification in 28 U.S.C. Section 144 – personal bias or prejudice either against or in favor of any adverse party – are included in 28 U.S.C. Section 455; 28 U.S.C. Section 455(a) allows greater flexibility in determining whether disqualification is warranted in particular situation, *United States v. Ritter,* 540 F.2d 459 (10th Cir. 1976). In determining whether judge should recuse under 28 U.S.C. Section 455(a), issue is not whether judge is impartial in fact, but rather

whether reasonable man might question impartiality under all circumstances. *United States v. Gigax*, 605 F.2d 507 (10th Cir. 1979).

Goal of U.S.C. Section 455(a) is to foster appearance of impartiality, and any question of judge's impartiality threatens purity of judicial process; since statute focuses on appearance of impartiality, as opposed to existence in fact of bias or prejudice, judge faced with this potential ground for disqualification ought to consider how his participation in given case looks to average man on street.

If trial judge was required to disqualify himself under 28 U.S.C. Section 455, but did not, Court of Appeals must reverse judgment and order new trial before different judge. *Potashnick v. Port City Constr. Co.*, ( 5th Cir. 1980), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652 (1950); *Powell v. Alabama*, 287 U.S. 45, 68, 53 S.Ct. 55,; On appellate review, "abuse of sound judicial discretion" test obtains. *Davis v. Board of School Comrs.*, 517 F.2d 1044; This court, in its opinion, *United States v. Alabama*, 828 F.2d 1532, 1539-41 (11th Cir. 1987) -

**.2. Legal Standard**

"The guarantee to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." N.20 To ensure that the courts remain above reproach, the Congress passed statutory provisions governing the disqualification of federal judges. The relevant statutes are 28 U.S.C. Sections 144 and 455. N.21 These two statutes control appellants' claim that the lower court erred in failing to disqualify Judge Clemon from presiding over this case. N.22

*Alabama* at 1540, [3]

Section 455(a) requires a judge to disqualify himself when "his impartiality might be reasonably be questioned." Thus under Section 455(a) an actual demonstrated prejudice need not exist in order for a judge to recuse himself: "disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." Congress expressly intended the amended Section 455 to promote public confidence in the impartiality of the courts by eliminating even the appearance of impropriety, n.30

*United States v. Meester*, 762 F.2d 867, 884 (11th Cir. 1985)

Thus a motion for disqualification may not ordinarily be based on the judge's rulings in the same case. *United States v. Phillips*, 664 F.2d at 1002-03; *Phillips*, 637 F.2d at 1020. An exception to the general rule that bias must stem from an extrajudicial source exists where "such pervasive and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1051 (5th Cir. 1975)

*Potashnick*, at 1111, [3]

Clearly, the goal of the judicial disqualification statute is to foster the appearance of impartiality. Cf.E. Thode, Reporter's Notes to Code of Judicial Conduct 60-61 (1973). This overriding concern with appearances, which also prevades the Code of Judicial Conduct and the ABA Code of Professional Responsibility, stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence. As this court has noted, "the protection of the integrity and dignity of the

judicial process from any hint or appearance of bias is the palladium of our judicial system." *U.S. v. Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109 (5th Cir. 1974). n.8 Any question of a judge's impartiality threatens the purity of the judicial process and its institutions.

[4] Because 28 U.S.C. Section 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word "might" in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality. *Note, Disqualification of Judges and Justices in the Federal Courts.* 86 Harv.L.Rev. 736, 745 (1973)